No. 2598

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY,
Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

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We will discuss the various propositions presented under the headings as they appear in the brief of plaintiff in error.

GENERAL OUTLINE.

On the 18th day of April, 1909, Nettie Ennis, the wife of Herbert L. Ennis and the mother of Guy W. Ennis, the defendants in error, received injuries resulting in death caused by a runaway team, the horses being frightened by a carcass which the railway company placed and permitted to remain on its right of way in close proximity to a public roadway used as such by the public, and intended as such by the public authorities. It was alleged that the carcass, in the condition in which it was as to appearance and through the emission of odors, was a public nuisance.

In December, 1909, an action was instituted in Valley County. There was a transfer of same to the Federal Court. In the complaint, it was alleged that the road was a public highway, regularly used as such by the traveling public. Issues were framed and the case came to trial in 1911. During the trial, it was contended that a variance existed from the fact that the public authorities in laying out the road didn't observe the statutory requirements in so doing. Leave was granted to amend the complaint, so as to conform to the proof, and the plaintiff in error forced a continuance of the case. The court held that the plaintiff in error could not be forced to proceed with the trial on account of an amendment being made as suggested. (Tr. pp. 30-32).

When these proceedings took place, in the light of the court's ruling, as to a variance existing, the amendments which were suggested were suggested orally. A continuance of the case occurring, the amendments were not then made. An amended complaint containing those amendments was filed. (Tr. p. 2).

A motion to strike the amended complaint from the files followed. (Tr. pp. 36-40).

This motion was argued and overruled. (Tr. p. 41). A demurrer was then interposed to the amended complaint and sustained and a second amended complaint was filed. A motion to strike out certain parts of the second amended com-

plaint was filed. (Tr. p. 45). This motion was denied.

A general demurrer was then interposed to the second amended complaint, which was overruled. (Tr. p. 15). An answer was then filed (Tr. p. 16) and through the filing of a reply the case was again at issue in February, 1913. (Tr. p. 21).

It is alleged that error has been committed on account of these amended complaints being filed, because, as is asserted, the defendants in error were permitted to repudiate the election, which it is claimed, they made. The defendants in error, in the first place, alleged that this was a public highway. Upon the trial they acceded to the ruling that upon the evidence a fatal variance existed. This was unfortunate. Experience has taught them to their cost that it would have been a good deal better if they submitted to the non-suit and corrected the error by appeal. In this way they would have been relieved of the embarrassment that they experienced in getting the case at issue, and they would have succeeded in disposing of the case much quicker than they have been able to do.

The learned trial judge while holding that a fatal variance existed, declared that on the facts developed, establishing a user of the crossing by invitation, the measure of duty on the part of the railroad company was the same as if the roadway was a public highway. Notwithstanding this, the trial was arrested in its progress and an amended

complaint was filed. In the amended complaint, the allegation was:

> "That on the 18th day of April, 1909, and for more than four years prior thereto, there crossed said railway and right of way at a certain point thereof so under the jurisdiction of the said John Hamilton, as aforesaid, a roadway recognized as such by the defendants and used by the traveling public as a public roadway, which said roadway after crossing said railway and right of way ran to the town of Bainville and to points beyond; that with such roadway so used as aforesaid, the defendants recognized the public use of same and for more than four years next preceding the 18th day of April, 1909, defendants, for the accommodation of the public so using said roadway as it crossed said right of way constructed and maintained a plank crossing where the said roadway crossed its tracks and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway and constructed and maintained at said point cattle guards and fences, such as are maintained where public highways cross railroad tracks and for more than four years next preceding the 18th day of April, 1909, the said defendants treated said roadway as if it were a public highway and during all of said time the defendants knew that the said roadway so crossing its said track and right of way was used by the travelling public and was so used without objection and with the tacit consent of the said defendant company.
>
> Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the County Commissioners of Valley County, assuming that said roadway was a public highway, expended public money in

its maintenance and repair, so that said roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known."

(Tr. p. 3.)

These facts are summarized in the transcript at page 29 as follows:

"That at the trial of said cause plaintiff sought to introduce evidence that for more than four years prior to the 18th day of April, 1909, there crossed said railway and right of way a roadway used by the travelling public; that said use of said roadway was known during said times to the defendant railway company, and that, during said period the said defendant for the accommodation of the public so using said roadway as it crossed the right of way of said defendant, constructed and maintained a plank crossing where said roadway crossed its tracks and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway, and constructed and maintained at said point, cattle guards and fences such as are maintained where public highways cross railroad tracks, and that during all of said time, the defendant railway company knew that the said roadway, so crossing the said track and right of way was used by the travelling public and was so used without objection and with the tacit consent of the said defendant company."

The amended complaint was filed pursuant to the leave which was granted, and it might be remarked in passing that the amended complaint conformed in every particular to the requirements of the leave which was granted. When the

amended complaint was filed, a motion was interposed to strike out portions of same. As the motion covers several pages of the transcript (36-40), we deem it needless to insert it here, from the fact that a second amended complaint was filed.

A second amended complaint was filed. The allegations of the second amended complaint as to the roadway are as follows:

"III.

That on or about the year 1906, the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which said roadway crossed said railway right of way of the defendant company at a certain point thereof, the same being the point heretofore referred to as under the jurisdiction and supervision of the defendant John Hamilton. Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide.

IV.

Plaintiffs further aver that the said roadway so attempted to be laid out, as a public

highway as aforesaid was in said year opened for travel and public use, and so open for travel and public use, crossed the right of way and tracks of the defendant company, as and tracks of the defendant company, as aforesaid, and so opened and used extended to the town of Bainville, in said Valley County, where a postoffice was maintained, and to points beyond, and since said roadway was so opened for travel, in said year, said roadway has been used at all times since then as if it were a public highway by the travelling public.

V.

Plaintiffs further aver that ever since said roadway was laid out and opened, as aforesaid, the county commissioners of Valley County have treated it as if it were a public highway and have expended money in its opening, maintenance and repair.

VI.

Plaintiffs further aver that after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for same across its said premises, as aforesaid, the defendant company placed and maintained across its tracks a plank crossing for use by the public travelling on said roadway, and ever since said roadway was opened, as aforesaid, the defendant company has placed and maintained, where said roadway crossed its rights of way, a warning signal that a public crossing existed there and has installed and maintained fences and cattle-guards bordering said roadway, as the same passes over its said right of way, and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway.

VII.

Plaitiffs further aver that the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and for more than six years last past, the defendant company has invited all persons using said roadway, to use that portion of same crossing its right of way, and at all of said times, and now, the defendant company knew that the travelling public used said roadway as it crossed its said premises, and knew that the said roadway was so used by them as if it were a public highway, and this use was enjoyed by the travelling public with the knowledge and consent and permission of the defendant company."

To the second amended complaint a motion to strike out parts of same was directed. This motion likewise is rather prolix, and for that reason, we omit inserting it here. (Tr. pp. 45-46-47).

The motion was overruled. A general demurrer was then interposed and overruled and this court is advised through a bill of exceptions how much in error the learned trial court was in refusing to sustain this motion and demurrer. (Tr. p. 53).

We quote from the transcript as follows:

"Thereupon the Court denied said motion to strike upon the ground that said amended complaint did not intend to allege, and did not allege, that the place of said accident (being the roadway in question) was a public highway, but only a roadway used by the public by the defendant company's license, acquiescence, permission or invitation. There-

upon this defendant demurred to said amended complaint and said demurrer was, by the Court, sustained, and now by said second amended complaint filed by the plaintiffs herein, and by the several portions thereof hereby severally sought to be stricken therefrom, the plaintiffs again seek to charge and again seek to litigate that the crossing in question was a public highway by being regularly laid out, as such, by dedication and by estoppel and in other ways known to the law, and again allege and seek to litigate the question as to whether or not the said crossing referred to in said second amended complaint, and in the prior pleadings herein, was a public highway. By said action on the part of the plaintiffs hereinbefore recited, however, and by electing at said trial not to stand upon said ruling of the Court, and by electing not to let said cause go to final judgment upon said ruling of the Court, and by electing not to have the said ruling of the Court reviewed, and by electing to abide by said ruling of the Court and to conform thereto and by applying to said Court for leave to amend said complaint by striking out and abandoning the averments that said roadway in question was a public highway, and by applying to the Court for leave to amend said complaint by setting forth that said roadway was not a public highway, but a roadway used by the travelling public by the license, acquiescence, permission or invitation of said defendant company, the plaintiffs have conclusively elected that their remedy is not to allege, or seek to prove, that said accident referred to in said second amended complaint, and in said prior pleadings hereunder, occurred upon a public highway, or that the crossing in question was a public highway, and they have conclusively elected to abandon the theory that this action

> is based upon an alleged violation of duties said to have been owing by the defendant to persons upon a public highway, and by the facts aforesaid the plaintiffs have conclusively elected to proceed upon the theory that the roadway in question was a private roadway used by the travelling public by the license, acquiescence, permission and invitation of this defendant company, and not otherwise."

Perhaps, with unnecessary detail we have at the outset set forth the foregoing facts. We have done so, however, studiously and purposely. We desire by this silent record to show to the court how critical the distinguished gentleman is who represents the plaintiff in error. A correct appreciation of his talents in this direction will be helpful when his brief is examined or at least that portion of it where he applies the broadsword to the learned trial judge for alleged misconduct.

It is needless to say that the amendments which meet the objection of the able counsel are proper.

In the case of Wabash Railroad Co. v. Hays, 234 U. S. 86, we have an instance of how liberal the rule is as to amendments. In that case an effort was made to recover under the Federal Liability Law. The proof showed that the indispensable element of interstate commerce was lacking. An amendment was allowed to conform to the proof, and a recovery was had under the state law. On this state of facts, the court said:

> "Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the

Federal Act, and when the proofs demonstrated that the injury arose outside of interstate commerce, and therefore that no recovery could be had under the Federal Act, the court was confronted with the question whether the declaration could be amended or regarded as amended to conform to the proofs. Holding that this could be done the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practice, the application of which was not in any wise in contravention of the Federal Act."

The rule as to amendments in Montana as stated by the Supreme Court of that state, is as follows:

"The rule observed by this court has always been to allow them with great liberality where they do not change the nature of the action or mislead the adversary party to his prejudice; its application going even to the extent of permitting them after verdict and judgment."

Leggatt v. Palmer, 39 Mont. 302.

It is likewise insisted that in some manner the doctrine of election should be invoked to the undoing of the defendants in error. We respectfully insist that this doctrine has no application to the facts in the case.

O'Mara v. McDermott, 43 Mont. 198.

In the case of

Agar v. Winslow, 123 Cal. 587,

the court said:

"If the plaintiff was mistaken and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him

> from subsequently availing himself of a remedy that he is entitled to under the facts of the case. * * * No case has been called to my attention, nor do I believe that any can be found which holds that a person is estopped from pursuing a remedy that he is entitled to because he has endeavored to avail himself of another remedy that he never was entitled to. If this were the rule then a mere mistake of judgment would result in depriving one of valuable rights."

And so the defendants in error say that because in their first complaint they alleged that this was a public highway and because of non-compliance with statutory requirements the trial court held upon a showing made by them that it was treated in all respects by the public authorities and by the railway company as if it was a public highway and was used by the public that a fatal variance existed, they should be permitted to amend their complaint, so as to set up those facts and maintain their action, if on those facts an action could be maintained.

MISCONDUCT OF COURT.

Before taking up in detail the acts of misconduct so exhaustively treated in the brief of appellant, we might, by way of preface quote the following from Vol. 17, American & English Encyclopedia of Law, 2nd ed. page 721:

> "A judge presiding at a trial is not a mere moderator between contending parties, but has active duties to perform in maintaining justice and in seeing that the truth is developed."

The power and authority which may be exercised by a judge in the trial of cases under different headings is treated in extenso in 38 Cyc., pages 1316 et seq.

It will be admitted by opposing counsel, we believe, that the record of this case by reason of the inefficiency of the stenographer who reported the trial is not correct in every detail. The learned trial judge so noted this in the following language:

> "After hearing defendant's argument on motion for a new trial made immediately after the above certificate signed, and discovering the chief ground relied upon, the court examined the bill and finds it defective, incomplete and unsatisfactory. It has corrected it in several particulars, pages, 61, 69, 70, 88, 93, 94, 95, 110, but the instructions especially are subject to the above criticism, though doubtless not to be remedied. The court knows the great difficulty the stenographer has in noting the court's remarks, and the greater, transcribing them. The court's earlier certificate is to be read herewith."
>
> (Tr. p. 238.)

We ask no forbearance, however, on this score,

We advert to the fact as explanatory of the existence of many foolish, absurd and obvious errors. Dependence was placed on the stenographer, so that notes of the testimony generally made by counsel were not made, and the transcription of the testimony and of the proceedings was so grossly inaccurate that even with the corrections made, palpable inaccuracies still abound.

The learned counsel for appellants says that when the defense of contributory negligence was touched, the court suddenly, to use a street colloquialism, "flew off the handle," or to borrow the language of the brief, "It was at this time that the court *suddenly* and without reason or excuse lost control, and first started on its course of hostility to the defendant, and from the time of this sudden and abrupt beginning defendant, even in its three respectful and earnest pleadings with the court was not able thereafter to restore the judicial equilibrium." (Brief p. 9).

The alleged drunkenness of the driver was the cause of the upheaval. The court's action in the premises, so it is alleged, was all the more appalling, as the answer set forth two separate defenses "separately stated and conspicuously numbered." These defenses and the manner of their presentation can best be understood by setting them forth for perusal here:

> "For its second separate answer to said second amended complaint, this answering defendant says that, if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein, then and in that event plaintiff's damage, if any, was due to, and caused by, their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants and employees, and each of them,

to exercise such reasonable care and caution for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint; and to the fact that the said Nettie Ennis and the said John Bigelow so negligently drove the said team of horses that the same ran away and escaped from their control. Further answering, this answering defendant says, that, if the matters of fact stated in said second amended complaint are true, then and in that event, in the exercise of such reasonable care and caution as the average reasonably prudent person, under all the circumstances then and there existing, would, could, and should, and ordinarily would, have exercised, the plaintiffs, the said Nettie Ennis, their and her agents, servants and employees and the said John Bigelow would have known—and, in fact, actually did know—the facts stated in said second amended complaint, if the same were or are true and they, and each of them, had the last clear chance to avoid the alleged negligence of this answering defendant and the damages, if any, resulting therefrom, and to avoid the said runaway and by the exercise of such reasonable care and caution aforesaid, as the average reasonably prudent person, under all the circumstances, would, could, and should, and ordinarily would, have exercised, they, and each of them, could, should, and would, and ordinarily would, have discovered and avoided the alleged negligence, if any, of this answering defendant, and the alleged dangers alleged in the complaint."

Even though this answer was read in the hear-

ing of the court, the court's attention might excusably be directed to the "make up" of the pleading, so that the drunkenness of the driver might be overlooked, veiled as it was under language so excruciatingly particular and at the same time so vague and indefinite as follows:

> "That if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein then and in that event plaintiff's damage, if any, was due to and caused by their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants, and employees, and each of them, to exercise such reasonable care and caution, for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint;"

Or the court's attention might have been directed to the inquiry as to whether such a pleading with hypothetical and conditional averments would be sufficient should an objection be interposed to the presentation of proof under it. Objection was not then made to the pleading, but now upon a more careful analysis of its contents we feel disposed to urge upon the favorable consideration of this court that this answer is fatally defective.

National Council Knights Ladies of Security vs. Owen, 149 Pac. 231.

At any rate, we insist that under its indefinite averments, the drunkenness of the driver would not be a proper subject of inquiry.

The Supreme Court of Montana, in the case of Gleason v. Mo. River Power Co. et al, 42 Mont. 243 states the rule as follows:

> "It has long been settled law in this state that the presence of contributory negligence is a matter of affirmative defense. (*Schroeder v. Montana Iron Works,* 38 Mont. 474, 100 Pac. 619.) This being so, it follows that contributory negligence should be pleaded with the same degree of particularity as is required of the plaintiff in pleading negligence on the part of the defendant. The manner of doing so was discussed at length by this court in the case of *Pullen v. City of Bulle,* 38 Mont. 194, 99 Pac. 290, 21 L. R. A., n. s., 42. (See Phillips on Code Pleading, sec. 503.)"

We are inclined to think that should some person have occasion to bring an action against Nettie Ennis and John Bigelow on account of being injured by this runaway that some little difficulty would be experienced in showing that the driver was drunk, and that his drunkenness was the cause of the runaway, on the allegation that they "didn't exercise reasonable care and caution as would, could and should, and ordinarily would be exercised by the average reasonably prudent person under all the circumstances then and there existing at all times and places stated in the complaint, and that they negligently drove the team,

so that they escaped from their control." In justice to the learned trial judge, it might be stated that even though this defense is "conspicuously numbered," he might be pardoned for inquiring as to whether the drunkenness of the driver was pleaded. This, however, is neither here nor there. We will return to the "sudden loss of control," referred to when the learned counsel tried to "restore the judicial equilibrium." The brief of appellant refers to the transcript at pages 152, 158, 194, 198 as the places where the efforts of the learned counsel to restore the "judicial equilibrium" proved unavailing. This court by confining its inspection to the pages referred to will glean little to enable it to reach a satisfactory conclusion as to whether at that particular time the learned trial judge was out of balance or not. It is only by considering the antecedent happenings that this can be done, and so that the court may be fully advised in the premises, we set forth fully what the transcript discloses in each case.

Instance No. One.

Mr. Hubener was on the stand. He testified that Mr. Bigelow had brought Mrs. Ennis to his place out in the country on the afternoon of the day of the accident. (Tr. p. 140). This place was witness' farm, which was about one and one-half miles distant from Bainville. (Tr. p. 140).

"Q. Did you drive back to Bainville with Bigelow?

A. Well, I ain't sure whether I drove back

with him or not, but I was in town and drove in town that afternoon with Mr. Bigelow. He was in town during the time that Mrs. Ennis was at the farm visiting my wife, and perhaps making other calls down around there.

Q. Did you see yourself where he went?

A. Well, I was naturally meeting him around my place.

By Col. Nolan: We object to that "naturally."

By the Court: Of course, the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant. Intoxication is not pleaded as a defese. The objection is sustained to this question. I don't see that that is an issue in this case.

To which ruling of the Court the defendant, by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you see him shortly before he left on the return trip to the Ennis ranch?

A. Yes, sir.

Q. What was his condition at that time relative to sobriety or intoxication?

By Col. Nolan: We object to that as incompetent, that being no issue in the case. The affirmative defense set up here in the in the answer has to do with a defense entirely independent of the condition of the driver on the day of the accident.

By Mr. Veazey: Contributory negligence is expressly pleaded in the answer. The answer charges that the driver so negligently drove the team that the accident happened. That is clearly sufficient to authorize the introduction of evidence as to intoxication. Pleading the fact of intoxication would be

pleading evidence. If you allege that an engineer so negligently drove his engine that a collision occurred, clearly intoxication of the engineer could be proved by the allegation.

By the Court: The objection will be sustained. There is no issue made as to the intoxication of the driver.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. Veazey: If your honor please, I have offers of proof which I imagine will take more than the time between now and twelve o'clock in order to write them out, the time when the recess is taken, and I should like to have an opportunity to prepare them.

By the Court: Very well." (Tr. p. 140).

Seemingly, during the recess, the court considered more fully the proposition as to whether under the plea of contributory negligence as pleaded, the intoxication of the driver would be admissible, and concluded that it would. The record discloses the following:

By the Court: I suppose you are proceeding to an offer of proof of the condition of the driver at that time.

By Mr. Veazey: In Bainville that morning.

By the Court: When did this accident take place?

By Mr. Veazey: It took place in the afternoon.

By the Court: There is a plea of contributory negligence on the part of the driver. Of course, it would be imputed to the plaintiffs if he was negligent with his driving. Now, I think if you can show his condition at the

time, as distinguished from previous habits, that you will be permitted to show that—his condition at the time, not previous habits. His condition at the time, or so near that it would be reasonable to infer that it would continue to the time of the accident, and that it was a condition that would affect his driving, that, I think, would be proper to be shown.

* * *

(Witness continuing):

I couldn't tell you the time that Bigelow left on his return to the Ennis ranch, but I should judge it was maybe three or four o'clock, somewhere in there. It was about the middle of the afternoon. I saw him that afternoon before he returned to the ranch.

Q. What was his condition at that time in reference to sobriety or intoxication?

A. I could not tell you exactly what condition he was in. He was in my place of business.

Q. Tell us his condition and how you came to observe it, and all the facts bearing on his condition. Just go ahead and tell us.

A. Well, I should judge that I know that Jack was taking a drink or two. I know he was in the——

Q. Tell what you saw—only what you saw.

A. I saw him take a drink or two. That is all I can state. He took one or two with me. As regards his condition, as to whether or not he was under the influence of liquor at all, he wasn't drunk. What I mean by drunk is that he wasn't staggering around. He apparently looked all right. As regards giving the jury the best picture I can as to his condition, it is quite a long time ago, but I know we were in there together. I met Jack

several times that afternoon and talked to him.

Q. Don't hesitate.

A. Well, he was in my place of business and we visited and naturally had a few drinks together. He also was down at Mr. Doyle's place. He was down in there. I don't know anything about that. During the time that Mrs. Ennis was down at my place, anyway during her absence, he was down at my place of business and on the street I met him several times and remember talking to him. I remember remarking to him as to the team.

Q. Well, now, in the language of the street—don't hesitate to use whatever language you desire to—such language that you would use on the street—what would be the expression of the street as regards his condition when you last saw him that day?

By Col. Nolan: We object to that as incompetent. He can tell us what his condition is.

By the Court: Yes, this man has been liquor dealing, and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk, without being urged strongly. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Will you describe in your own words and in the words that you would use on the street what you considered was his condition when you last saw him in Bainville?

A. Well, as near as I can describe it, I would put it this way. He wasn't drunk, but feeling good. That is about as close as I could come to it.

Q. Well, didn't you describe it to me as just short of a good start for a spree?

A. Well, if he was feeling good, I suppose if he had stayed there, why, naturally, he would have wound up in a spree.

By the Court: You will have to explain to the jury where the man started from—his condition short of the start.

Q. Was that the expression that you used to me, that he was just short of a good start on a spree?

By Col. Nolan: We object to that as immaterial, what was said to counsel. We were not there to be able to keep track of it.

By the Court: Sustained.

By Mr. Veazey: I desire an exception.

By the Court: It will be noted.

By Mr. Veazey: I desire to offer to prove by the witness that in response to questions by us as to what was Bigelow's condition when the witness last saw him on the street on the day of the accident, that the witness described him to us as just short of a good start for a spree.

By the Court: Any objection?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: It is very vague. I don't see that it would enlighten the jury any if he did see him at that stage, but he says that he did not see him drunk to the extent that he was staggering, and the witness states that he was feeling good, it looks to me about as far as this witness can go. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed. (Tr. pp. 142-147).

The cross-examination of the witness was taken up, and he was interrogated as to whether in a

conversation that he had with Mr. Ennis and others during the recess, he didn't say that he was mistaken when he said that Mr. Bigelow had been to the farm with Mrs. Ennis. (Tr. pp. 148 and 149).

Then he is re-examined, although it is marked "Re-cross Examination," evidently a mistake, as follows:

> "As regards whether after the adjournment this noon the plaintiff sought to discuss with me my testimony, why Mr. Ennis met me out here in the hall and told me I was mistaken about Jack driving Mrs. Ennis out to my farm. Of course, I figured at the time I wasn't certain. I didn't say I was certain in my testimony and tried to refresh my memory on it, and I finally told him I thought he was right about it. I could get it from my wife, but I never thought of it when I came up here. She was out there and I remember meeting her, but whether I met her the first day at the farm or in town, I couldn't remember. Jack was out at the farm, and I think she was. Certainly I was perfectly free in giving my information to Mr. Ennis.
>
> Q. You didn't hold back anything?
>
> By Col. Nolan: I object to that as irrelevant and immaterial and not proper re-direct examination.
>
> By the Court: Objection sustained.
>
> To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.
>
> By Mr. Veazey: I desire to prove that this witness talked voluntarily and freely at the instance of Dr. Ennis in the talk that took

place during the noon intermission in regard to all the facts in the case.

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. In view of your statement on direct examination and the statement now made to Dr. Ennis in regard to the sobriety or intoxication of Mr. Bigelow, would you turn to the jury and tell them what you know as regards his condition. Give them your best judgment of his condition at any time on the 18th day of April at Bainville.

By Col. Nolan: We object to that as not redirect examination, as repetition of the testimony already given.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: If the court please, here is an instance where in justice to the witness it is only proper—

By the Court: No, I don't care about hearing anything. The court has ruled.

Exception taken by the defendant.

Q. I may be incorrect in understanding your testimony, Mr. Hubener. I understood you to say that your judgment was that though he was not drunk he was under the influence of liquor while at Bainville that day shortly before starting, and I understand that you stated to Dr. Ennis that you cannot state whether he was drunk. Will you enlarge on that?

By Col. Nolan? We object to that. I don't think it is right to have a question of that kind put in the light of the testimony of this witness.

By Mr. Veazey: If I might interpose at this time—if the jury doesn't want any enlightenment on that, I want some enlightenment. Here is a statement which I am sure I misunderstood, and I think counsel has misunderstood it.

By the Court: I think not. All this witness' testimony was very straight, both before on the direct examination and on the cross-examination. I don't think the jury is in any doubt about it. The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Do you recognize, Mr. Hubener, that there is any inconsistency in your testimony on direct examination and in your testimony as to your conversation with Dr. Ennis?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: It will be for the jury to say. The objection is sustained.

Exception taken and noted by the defendant.

By Mr. Veazey: We offer to endeavor to get from the witness an explanation as to any possible inconsistency in his testimony, as regards the condition of the witness Bigelow and his alleged declaration to Dr. Ennis.

By Col. Nolan: We object to the offer as improper, irrelevant and immaterial.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted,

which said exception was thereupon duly noted and allowed."

(Tr. pp. 150-153).

INSTANCE No. Two.

Mr. Provost is on the stand. He is a witness for the defendant. He testified as follows:

"I had seen the Ennis horses before the runaway occurred on the 18th of April. To my knowledge I would call them a high-strung team. No, sir, as to whether I would give any other designation of them, no sir, I don't know anything about them.

Q. What would you say as regards the skill, if there would be any, necessary to handle them?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Would you say that those horses could be described as kittens?

A. I shouldn't think so.

By Col. Nolan: We object to that. I don't think that is competent or material.

By the Court: I hardly think so. Objection sustained.

To which ruling of the court defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove that in his opinion they would not be horses that could be described as kittens as gentle horses.

By Col. Nolan: I object to that as incompetent and immaterial.

By the Court: He may describe what he knows of them. He has already said in his opinion they appeared to him a high-strung team. The objection is sustained.

To which ruling of the court defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Can you give us any other description of the horses other than they were a high-strung team?

A. No, sir.

Q. Would you call them bronchos?

By Col. Nolan: To that we object as leading.

By the Court: The objection is sustained.

By Mr. Veazey: Where counsel asks questions and endeavors to get the facts and the witness, for one reason or another, perhaps because of the glamour of the court room, or what not, is not able to respond readily—

By the Court: I don't care to hear an argument. The court has ruled.

By Mr. Veazey: In the interests of the defendant, I feel called upon to state to the court—

By the Court: When the court wants any argument from you and instructions on the law, he will ask for it, and until that time comes you will refrain.

By Mr. Veazey: I beg your honor's pardon, but desire an exception to the remarks of the court.

By the Court: It may be noted, which said exception was thereupon duly noted and allowed.

Q. Did you describe those horses to me, Mr. Provost—

By Mr. Veazey: If the court please, I have got to give this question in this way.

Q. Did you describe those horses as bronchos, rather wild and hard to handle.

A. I did.

By Col. Nolan: We object to that as hearsay and leading, and even if they are so described, that is immaterial. The only evidence competent would be as to their runaway disposition.

By the Court: The question is a leading one. If the witness has made any statements here contradictory of any statements he had made elsewhere, this would be a permissible question, in order to refresh his memory, or if surprise is claimed. Otherwise not.

The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove that the witness did today describe the horses as bronchos rather wild and hard to handle. In this connection we offer to prove that the leading of the witness is more or less necessary and has not been undertaken by counsel until it was found necessary to do so.

By Col. Nolan: I object to that as immaterial and irrelevant.

By the Court: Objection sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 157-160).

In passing, we might parenthetically remark, as revealed by the foregoing testimony that the distinguished gentleman at that particular stage of the proceedings stood more in need of a sedative than did the trial judge. The foregoing

shows that the witness had testified that the horses were bronchos, were high-strung and were not kittens, and that he had told the learned counsel so. All of this was with the jury, and yet the offer of proof excluded contained those facts and nothing more.

INSTANCE NO. THREE.

Mr. Hamilton was on the stand and examined by Mr. Veazey and testified as follows:

> "In that work of prospecting for gravel in going to and from my work, I went by this crossing lots of times. I would be out on a trip prospecting for gravel ten hours a day. Ten hours' work was my day. I would be out prospecting for gravel, possibly, eight or ten hours a day. I would be out just about eight hours, is what I mean. Then I would come home every day. As regards what opportunity I had to observe this crossing from the time the carcass was there until the time of the accident, well, I was prospecting for gravel in all directions around Bainville there: I passed that railroad crossing there, we will say about three or four times a week. I don't remember exactly about this—about how many times in the week, and the carcass of a horse was burned there. The carcass was burned three times. The first time it was not a very good job on that carcass and then the section foreman that was in charge of the section at the time started up another fire and burned it. But still there was something left after that and the Central Security had a lot of hound dogs, you call them, and I see the dogs there eating the meat off. After I finished my search for gravel, I had charge of the same section. As regards my opportunity

in the course of my work in charge of that section after I had finished searching for gravel to observe that crossing, well, my duty was to go over the section every morning and go over the section regularly. I would return every day, but sometimes it was late in the evening about five o'clock. My section extended from Lakeside on the east to the west end of the Bainville yard.

Q. So your section extended from the west end of the Bainville yard easterly?

By the Court: You needn't go into details. If the plaintiff wants to examine him he can. All his duties would cover too much ground for this particular purpose.

Q. How would you go over your section?

A. About twice a day. We start out from Bainville at seven a. m. on a hand-car operated by hand. As regards whether in approaching this crossing, there would be anything that would control our movements over there and over that crossing as regards going fast or slow, we had to stop there and send a man ahead there on account of a short curve and a cut to the east. I had to send a man ahead to look for trains.

Q. In your work as section foreman, what is your duty?

Col. Nolan: I don't care about this. I don't see any point to this.

By Mr. Veazey: I want to show his opportunity for observing the conditions there.

By the Court: Never mind. Bring it right down to the crossing, and if the transaction isn't specified with sufficient particularity that can be brought out on examination. Prove what he knows about the conditions at this crossing.

(Witness):

A. Yes, sir. I know the facts in regard to

the carcass and its condition. I never noticed any odor or smell from that carcass.

Q. Was there any fact right before the accident or do you recall any fact which would show your ability to observe whether or not there was any odor from the carcass?

By Col. Nolan: We object to that as being incompetent, immaterial and irrelevant and leading and suggestive.

By the Court: You have asked him in infinite detail now and what he saw there. He has said there was no odor. Now, I think that serves your purpose. Objection sustained.

To which ruling of the court, defendant by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Did you ever stop there shortly before the accident?

A. Yes, sir.

Q. What did you stop there for.

By Col. Nolan: We object to that as immaterial.

By the Court: Objection sustained.

To which ruling of the court, defendant by its counsel then and there excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove by the witness now upon the stand that he often went back and forth there, before the accident and that he and his men took dinner on the right of way there on the crossing and observed no odor from the carcass.

By the Court: You can ask why he stopped there. Ask him how long he stopped there.

By Mr. Veazey: Is the offer of proof denied?

By the Court: Oh, yes.

To which ruling of the court defendant by its counsel then and there duly excepted,

which said exception was thereupon duly noted and allowed.

By Col. Nolan: Of course, I have no objection to his showing that he was there a week before and that he crossed there.

By the Court: The court has indicated that he may do so. There is a limit to these matters of detail.

Q. How long did you stop there on the occasion about a week before the accident, right near the carcass?

A. I stopped there during dinner time. I and my crew eating dinner there.

By the Court: You are asked how long you stopped there at that time.

A. An hour. I stopped right in the crossing there at the edge of the track.

Q. What direction did you give as regards the burning, as regards the fuel which should be used?

By Col. Nolan: We object to that as immaterial what direction he gave as to the fuel or what was done in that connection.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

A. No, sir, I did not set the fire myself.

Q. When you would look for gravel, what conveyance did you use then?

By Col. Nolan: We object to that as immaterial.

By Mr. Veazey: Will your honor trust me in this particular this time—how did you go?

By the Court: The trouble is you make it hard work. Your examination. Too much detail. This matter of his traveling and stopping there for dinner is not of consequence. It was enough for him to stop there that long

and to testify he had to demonstrate his opportunity for observation. It was enough for him to stop there that long and to say so, to show his opportunity for observation without detailing he stopped there for the purpose of eating his dinner or any other reason.

Q. How did you go over the country when you would go prospecting for gravel?

A. On a saddle horse.

Yes, sir, that saddle horse took me over that crossing. That carcass did not bother my saddle horse at all as I went over that crossing. At the time of this accident I had entered a homestead. I have a farm, yes sir." (Tr. pp. 189-194).

The other instance to which reference is made occurred at the close of the trial. It relates to an expressed intent on the part of counsel in case the jury returned a verdict in favor of the plaintiff that because counsel felt that the court ruled too frequently against him and because counsel was hampered in the examination of witnesses, and because the court's demeanor may have affected the jury, the court would be asked to review these matters on a motion for a new trial. (Tr. p. 198).

We have known of demonstrations of this character favorably influencing a jury. Such an idea could not remotely lurk in counsel's mind. Perish the thought.

Misconduct of the Court on the Defense of Contributory Negligence.

Under this heading, counsel for plaintiff in error discusses the difficulties that he encountered in adducing evidence as to the drunkenness of the driver Bigelow. He complains because of the inquiry made by the court as to whether the plea of contributory negligence had been interposed.

On the cross-examination of Mr. Ennis, exhaustive in scope, counsel for plaintiff in error took up with the witness his knowledge of Mr. Bigelow, the driver. In his examination in chief he testified about Bigelow working for him for a period of six months doing general farm work, and that he was a thorough good horseman. (Tr. pp. 66-67).

Upon cross-examination he testified without interruption as follows:

> "I had confidence in Bigelow, the driver, yes, sir. I knew he drank, yes, sir. As to whether I knew that he drank heavily, he never did when he worked for me. He was working for me about six months. I had known him probably a year prior to that. As to whether I knew that his general character may be described as a heavy drinking man, he was a man that drank occasionally.
>
> By the Court: Have you any plea of contributory negligence in here?
>
> By Mr. Veazey: Yes, sir.
>
> By the Court: If you have no issue based on this I cannot see that it is competent and worth while going into.
>
> By Mr. Veazey: There is an issue on intoxication of the driver in connection with the accident.
>
> By the Court: Very well, proceed.
>
> Q. Don't you know the instances yourself where Bigelow was drunk?
>
> A. Yes, sir.
>
> Q. Now, what instance do you know of in that connection? Tell it to the jury, will you?
>
> A. Well, one time he went up there with a saddle horse to Bainville. I don't know

from my own knowledge that he was drunk then, though I would think he was.

By Col. Nolan: I object to that. The question is whether he knows whether he was under the influence of liquor at the time and whether it contributed to the injury complained of. This testimony is incompetent, irrelevant and immaterial.

By the Court: Yes, I will sustain the objection.

To which ruling of the court, defendant by its counsel, then and there duly excepted, which said exception was thereupon noted and allowed.

By Mr. Veazey: We offer to prove by this witness now on the stand that he knew that the driver Bigelow prior to the accident was a man given to the habitual use of intoxicating liquors to excess.

By Col. Nolan: I object to that unless it is shown in that connection that he was incapacitated at the time in question by drunkenness.

By Mr. Veazey: We disclaim any intention of proving by this witness that he was intoxicated at the time, but we offer this testimony to prove his habitual intoxication and to disprove the assertion of the witness that he had confidence in the driver Bigelow.

By the Court: I will sustain the objection. There is no issue framed on this as the court sees it, and it is improper cross-examination.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 78-80).

What is there in this occurrence to justify the claim that there was an improper interference with the orderly proceedings of the trial? There

was nothing improper in making the inquiry as to whether this character of evidence was competent. It was the first time it was broached in the trial, and the record discloses that upon the court being advised that there was an issue of intoxication of the driver, counsel was permitted to present evidence as to intoxication. Counsel, however, desired to show a habit of intoxication and intoxication at other times. This, the court deemed incompetent, and in all of the varying moods of counsel, then and thereafter, as shown by this record, the court unalterably and consistently ruled that this evidence was incompetent.

Upon being advised, however, that intoxication was not specially pleaded, an objection to this evidence was sustained. (Tr. p. 141). It was then that the recess occurred, and upon the reassembling of the court, the court inclining to the belief that the evidence was competent under the allegations of the answer, the fullest latitude was given to show the condition of the driver on the day of the accident. Surely, it cannot be claimed that an inquiry by the court when the matter of the intoxication of the driver was reached as to whether that was an issue, the pleading silent on the subject, except as it might be covertly disclosed by the general allegation "that the driver and Mrs. Ennis negligently drove the team," constituted an act of impropriety.

While it is true that the inquiry made by the court as shown by the record was whether there

was a plea of contributory negligence. Upon being advised that there was, the court then inquired "If you have no issue based on this, I do not see that it is competent and worth while going into." Based on what? Based on intoxication of the driver, of course, and the learned counsel so understood it.

"By Mr. Veazey: There is an issue of intoxication of the driver in connection with the accident.

By the Court: Very well, proceed." (Tr. p. 78).

Counsel then proceeded to interrogate the witness, not as to Bigelow's condition on the day of the runaway, but rather as to Bigelow's habits of intoxication, and this evidence the court at all times upon objection adjudged incompetent.

At any rate when the objection was made, the witness was testifying to facts of which he had no personal knowledge. (Tr. p. 79).

The court then being advised that intoxication of the driver was not expressly pleaded, ruled, upon objection, that the evidence was not competent, and the incident closed. (Tr. p. 80). During the noon recess the changed ruling was made, with directions to the learned counsel to present all the evidence he had as to Bigelow's condition on the day of the accident.

Counsel encountered no difficulty in presenting such evidence as he had on that score.

The learned counsel does not seem to differentiate between the rulings of the court as to the con-

dition of Bigelow as to intoxication on the day of the accident, and the rulings of the court as to habits of intoxication, or as to Bigelow drinking at other times. If there is anything that rings clear in the record from beginning to end it is that all evidence as to Bigelow's condition on the day of the runaway was competent, and that evidence as to habits of drinking was not. If this distinction is noted, the deductions on page ten of the brief are without justification.

We read as follows from appellant's brief, page eleven:

> "Defendant thus had difficulty in getting this proof as to the condition of the driver into the case, but it appears that the plaintiff had no such difficulty, for, after voluntarily attempting to confine the plaintiff's proof to what the court considered were the issues, and after having ruled, without objection by the plaintiff, that there was no issue of contributory negligence, or of intoxication, we find that the plaintiff, without any interruption by the court, is allowed, through the witness, Mrs. Charles Allison, to testify that Bigelow, at the time of the accident, was perfectly sober." She was cross-examined on this. Again, Mrs. Katy Meinhardt was allowed to testify for the plaintiff that Bigelow 'was perfectly sober,' and that 'there was no sign that he had been drinking at all,' and she also was cross-examined on this."

In the testimony of Mrs. Allison, the following appears:

> "As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day as to his being

sober or under the influence of liquor, he was perfectly sober as far as I could see."
(Tr. p. 100).

And upon cross-examination counsel interrogated the witness as follows:

"Did Mrs. Ennis say anything to you at the time about his having had any liquor or anything like that?
A. No, she did not.
Q. Did she say anything after the accident about his having had any liquor?
A. No, sir."
(Tr. p. 102).

And in the case of Mrs. Meinhardt, the following appears:

"As regards his condition that day, whether he was temperate or under the influence of liquor, he was perfectly sober."
(Tr. p. 109).

And upon cross-examination, the witness said:

"When we came back we did not see any sign that he had had intoxicating liquor."
(Tr. p. 110).

This witness accompanied Mrs. Ennis to the Hubener farm house and returned with her to Bainville when the team was turned over to Mr. Bigelow, when without further delay they started for home. (Tr. p. 110).

The testimony of these witnesses was given through deposition. There was no objection interposed to the testimony in chief. It is true that counsel sought to prevent the cross-examinations being read, urging in that behalf he had a right to do so. The court held against him. As to whether

he had such a right is discussed elsewhere in this brief. We submit in fairness that the excerpt from the brief supra is far-fetched—more than far-fetched—it is unwarranted.

A fault-finding disposition is in evidence because the court directed counsel to make an offer of proof in writing, as the rules of court required. (Brief page 12). Here the record gives evidence of incompleteness. (Tr. p. 136).

A question is put to the witness Gardner as to Bigelow's habits of intoxication. An objection is made and sustained and exception noted. (Tr. p. 138).

The record then shows the following:

> "By Col. Nolan: If your honor will tell the jury where you exclude the evidence that they will not consider it.
>
> By the Court: You may write your offer of proof, if you think it will do you any good. We will give you time. It is not admissible under the issues in this case."

We do not believe that the learned counsel will say that this truly represents the facts. One would suppose from this narrative that Col. Nolan was directing as to what should be done. Mr. Veazey, we are satisfied, will not have the hardihood to say that such a thing would be possible, Judge Bourquin presiding.

The record as it appears, clearly shows that there is omitted matter. With the record in its present condition, there is nothing in the context which could elicit the statement from Col. Nolan,

and there is nothing in the context which would authorize the court's remarks. There was no effer of proof made, to which the court's remarks could have reference. The fact is that counsel for plaintiff in error advised the court upon the objection being sustained that he desired to make an offer of proof, and started in to do so, when the court stated that the rules required such offers to be in writing. Col. Nolan then made the statement probably in substance as the record shows. The court then suggested that the stenographer might be taken beyond the hearing of the jury and the offer of proof dictated to him. The stenographer was taken to a room adjoining the courtroom, and the offer of proof dictated, which in an abridged form is in substance the offer which appears in the record.

As we have heretofore stated, we disclaim any purpose to do other than abide by the record. Where, however, the record makes the actors seem ridiculous in justice to them, it is only fair and right that some explanation should be offered.

Considerable space is devoted in appellant's brief to analyzing this language of the court in directing that the offer should be in writing. (Brief pp. 15 and 16). In the first place, we dispute the correctness of the conclusions set forth. In the next place, if the language was susceptible of the construction now contended for, and if counsel was apprehensive that his case was preju-

diced thereby, it is passing strange that instant action was not taken, and the suggestion made to the court that the incident was one which should suffer correction at the hands of the court.

Counsel further comments as follows:

> "On the offer of proof being made the plaintiff objects to the same on the ground that habit is too remote, and finally, and apparently more under compulsion induced by the court's demeanor, reluctantly includes the court's objection that the evidence was not admissible under the issues, which objection the court sustained."
> (Brief, p. 13).

If the foregoing is intended to apply to the writer, who made the objection, although, undoubtedly, somewhat different in form, all that he can say is "That he denies the soft impeachment."

Counsel tells us in the trial of this case he acted at times under compulsion. This comment would lead one to believe that counsel for plaintiff in error imagines that respondent's counsel likewise at times acted under compulsion. It may be the case of a man under the influence of liquor imagining that everybody with whom he comes into contact being equally so. If during this trial the writer acted under compulsion, he is not now aware of that fact. He thought, as undoubtedly most lawyers do, when the court ruled against him on propositions submitted, that the court was wrong. This and nothing more.

We insist that counsel for plaintiff in error ex-

perienced no difficulty in getting to the jury such evidence as the court deemed competent, as to the condition of the driver as to intoxication on the day of the accident. He did experience difficulty in getting to the jury evidence as to habits of intoxication. The record likewise discloses persistent and repeated efforts after the court's position was clearly defined to get before the jury in some way this evidence of wrong-doing, pursuing a course calculated to sorely try the patience of a judge, in doing so, impassive almost to the point of insensibility.

We have already referred to the incident at Bainville as to Hubener's testimony at so much length and have set forth the testimony as the record presents it, that little good would be subserved by reviewing it here at any greater length. As we read appellant's brief, and as each circumstance is given consideration, we cannot refrain from using the quotation from Shakespeare:

"Trifles light as air are to the jealous confirmation strong as proofs of holy writ."

When the question was settled that the driver's condition on the day of the accident was the proper subject of inquiry, the court said "yes". That is the attitude the court maintains. "If you have anything in reference to that at all you may proceed". (Tr. p. 143).

Complaint is now made as to the use of this language. We quote from the brief of the plaintiff in error, as follows:

"The court said: *'If you have anything in relation to that at all* you may proceed,' from which remark the jury may have understood that the court meant to indicate, we think, a sort of anticipatory lack of credence in any testimony along these lines, and the court's action seemed to carry the possibility of it conveying a warning to the witness not to incur the court's displeasure in any testimony which the witness might be about to give on a matter which the court had thus for so long forbidden defendant from rebutting (Tr. p. 142 to 143)."

(Brief p. 16).

We don't share with counsel the belief that the language under review is susceptible of the sinistrous construction which is given to it.

If, however, any fear was entertained that its use had a prejudicial effect upon the jury, the court was not advised of that fact. If there was any improper, unnecessary emphasis or inflection that gave the language the significance which is now given to it, the record is silent on the subject.

We rather believe, without laying claim to excellence in casuistry, that this language was intended to convey the idea to counsel that if he had any evidence, proximate or remote, direct or circumstantial, bearing upon the intoxication of the driver on the day of the accident, such evidence could be introduced.

The testimony of Mr. Hubener is then analyzed.

(Brief p. 17).

We have heretofore presented in full the portion of the record which contains the proceedings

that transpired when the witness was examined.

These proceedings appear at pages 145, 146 and 147 of the record.

Anteceding those proceedings, the witness testified in detail what he knew about Mr. Bigelow's condition. He testified without objection that Bigelow was not drunk; that he apparently looked all right; that he was in the witness' place of business, and that they naturally had a few drinks together. (Tr. p. 146). Not satisfied with this, counsel desired to know how, in the language of the street, his condition would be described. Although this was objected to the witness answered by saying, "Well, as near as I can describe it, I would put it this way, he was not drunk but feeling good. That is about as close as I could come to it." Nothing daunted, counsel then put this question:

> "Q. Well, didn't you describe it to me as just short of a good start for a spree?
> A. Well, if he was feeling good, I suppose if he stayed there, why naturally he would have wound up in a spree.
> By the Court: You will have to explain to the jury where the man started from—his condition short of the start."

Again the question is put to the witness. This time an objection is interposed, and the objection being sustained, an offer of proof is made, that the witness told counsel that Bigelow's condition was "just short of a good start for a spree." An objection is made to this offer of proof, and the court said: "It is very vague. I don't see that it

would enlighten the jury any if he did see him at that stage."

Having a personal knowledge of counsel's great ability in argumentation, we have perused much of counsel's argument as to the misconduct of the court with mingled feelings of amusement and appreciation. The portion we have now under consideration, we read with surprise and astonishment. We believe that counsel has candor enough to admit that the court at this juncture did not make the statement which before correction read that it would not enlighten the jury if the witness did see him "drunk."

If through remissness or oversight, a palpable error exists in a bill of exceptions, a correction of same can surely be made by the trial judge, and it seems to us in awful poor taste in the printing of the transcript, that the correct portions and the corrections should both appear. If such was the remark which the court made, why should counsel overlook same, ever vigilant as the record shows he was, and why should counsel, where an exception would amount to something, remain silent? Why should such a remark be made by the court when again and again, the court had ruled that Bigelow's condition as to drunkenness on the day of the runaway was a proper subject of inquiry. Counsel does not contend that this court can act on the assumption that such a remark was made by the court. Its interpolation in the record is unfair, unjust and unwarranted, and

with this characterization of it, we will pass to something else.

And lastly, under this heading, we are told, piling "Pelion on Ossa," the court instructing the jury and commenting on the evidence, said that most men take a drink or two occasionally. (The language of the court is set forth in appellant's brief, pp. 22 and 23).

Suffice it to say that it is within the court's province to comment on the evidence, and suffice it to say, too, that the court's instructions and the court's comments seemed to meet with the unqualified approval of the learned counsel, except in the particular that the court refused to instruct on the last clear chance doctrine so-called.

CARCASS DID NOT CAUSE RUNAWAY.

Under this heading still canvassing the misconduct of the court, the testimony of Provost is referred to as presenting evidence showing an unfriendly disposition on the part of the court.

We quote from the brief, as follows:

> "Let us bear in mind that this witness is shown by the transcript to have been affected by the court's attitude to such an extent that on cross-examination, when asked whether he was not a 'standing witness' for the railway company, dazed, he answered 'yes,' though proof showed that he had never been a witness except in a single instance, at which time he was an eye-witness."
>
> (Brief, p. 26).

We are repeatedly told in the course of coun-

sel's argument, not exactly using his phraseology, that he suffered discomfiture and dismay by reason of the court's rulings and demeanor, so that his client's interests suffered, and that the jurors, undoubtedly, observant of what was occurring, may have been prejudiced by these happenings to which reference is made.

We were prepared to hear this. We must confess, however, we were not prepared to hear from the learned counsel the charge which the foregoing excerpt suggests, and while we were prepared, with the complaints made on the argument on motion for a new trial, to hear that the learned counsel himself was discomposed and disturbed to the point of exhaustion, we were not prepared to hear from counsel that the cause that almost prostrated him, likewise, served to "daze" the witnesses, so that counsel was unable to get the best service out of them. Although fearful of being punished for judicial sacrilege through speaking irreverently of judges, even in jest, having in mind the complaints which the distinguished counsel makes of Judge Bourquin, and having in mind "the supposed" effect of the judge's conduct, and to fittingly describe him from the standpoint of the plaintiff in error, we would have to borrow the title of that modern ragtime melody, "He's a devil in his own home town."

The subject is, however, not one for levity, and in a more serious mood, we must resume the task

of attempting to exculpate the judge, so as to save him from being "drawn and quartered."

The transcript shows the following:

> "Q. As a matter of fact, you are a standing witness, aren't you, for the Great Northern Railway Company in all of their cases?
>
> A. Standing witness?
>
> Q. Yes, in all of those cases you are always called as a witness for the railroad company?
>
> A. Yes, sir, I was called a few times."
>
> (Tr. p. 161).

And upon re-direct examination, with nerve-straining detail, this incident is detailed as follows:

> "Yes, sir, I have been a witness for the Great Northern Railway Company once or twice. I did not testify in this case before. I was called as a witness at the last trial, but I was never on the stand. I have also testified for the Great Northern Railway Company in Glasgow in a fire case and in Williston, North Dakota. The cases in Glasgow and in Williston were not different fires, but two cases for the same fire. I have testified for the Great Northern in no other case."
>
> (Tr. p. 162).

This evidence does not justify the conclusion by any means that the witness was in the dazed condition which the brief suggests. Besides, the record is silent on the subject, as to whether the witness was present in the court room before being called to the stand. The probability is that he was not. We are tempted to exclaim, "Of such airy nothings are dreams made of." The very

acme of impropriety is reached, however, when an objection is sustained to the following question:

> "Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?
>
> By Col. Nolan: We object to that as leading and repetition of what the witness has already stated."
>
> (Tr. p. 156).

In the brief it is stated that the objector said the question was leading and *"suggestive."* (See Brief, page 26).

When this objection was made, as the transcript will disclose, the witness had already told with extreme detail what he knew about the crossing. The question, in the light of the disclosures already made, could elicit nothing new, and the objection to it was properly sustained.

We quote as follows from the record:

> "Q. Can you give us any other description of the horses, other than that they were a high-strung team?
>
> A. No, sir.
>
> Q. Would you call them bronchos?
>
> By Col. Nolan: To that we object as leading.
>
> By the Court: The objection is sustained.
>
> By Mr. Veazey: Where counsel asks questions and endeavors to get the facts, and the witness for one reason or another, perhaps because of the glamour of the courtroom, or what not, is not able to respond readily—
>
> By the Court: I don't care to hear an argument. The court has ruled."
>
> (Tr. p. 158).

What admirable tact! What subtle versatility! We have heard judicial sternness and judicial unfairness and judicial hostility described in many ways, more or less expressive, and in most instances in terms of severity, but it remains for the distinguished counsel representing the plaintiff in error to describe it as the glamour of the court room.

Whatever may be said *now* by distinguished counsel as to disadvantages suffered through the court's ruling or demeanor the record gives no evidence of same. As evidence of this we might instance the effort on his part to elicit testimony from Mr. Provost as to the disposition of the team. Its disposition is shown in every conceivable way. The horses are not kittens. They have a broncho disposition. They are a high-strung team. These facts are developed time and again, and, after this is done four pages of the record are consumed in saving exceptions, because repetition is forbidden. We ask in all candor after reading the evidence on this point as well as reading the record in the other matters where it teems with exceptions, where is the evidence that is at all competent or remotely competent that has been excluded? The repeated efforts where adverse rulings are made, because the evidence is already in, does not show that the distinguished counsel suffered any embarrassment by reason of what was taking place. In most cases where adverse rulings are recorded, counsel in disregard

of them, returns to the same matter and persists in putting the same questions.

Another feature that might be commented on, as to the rulings complained of and as to which exceptions are preserved. The objection in most cases seems to be made after the answer is given, and the answer stands, regardless of the objection interposed to the question.

Complaint is, likewise, made as to something that transpired in connection with the examination of the witness Lundquist. Mr. Lundquist is undergoing cross-examination as follows:

> "Well, now do you pretend to tell us, Mr. Lundquist, that it was not any decomposed—any decomposition in that flesh there at all?
>
> A. Not as bad as later on in the summer when the weather was warm.
>
> Q. I don't care how it would be, but I am asking you was there any at all?
>
> A. I never noticed any.
>
> Q. You wouldn't say that there was, or was not?
>
> A. No, I wouldn't. I knew there was nothing said about any smell that day.
>
> Q. I didn't ask you about that, Mr. Lundquist. Will you kindly answer my question.
>
> By the Court: Yes, don't volunteer any information."
>
> (Tr. p. 181.)

To see how a molehill may become a mountain, we quote from the appellant's brief:

> "On the same subject the witness John Lundquist, who was a merchant, banker and rancher, drove to the scene of the accident over the very crossing in question as soon as the accident occurred. He testified that the

carcass did not bother his horse and was not in a condition to bother horses. He is severely cross-examined, and he endeavors to answer as a layman would answer. He is asked whether there was any decomposition in the flesh at all. He answers 'there was not as bad decomposition as there would be if the flesh had rested there in the warm weather of summer'. The answer was directly responsive. Counsel improperly reprimands him, with no disapproval of the court, on the ground that this responsive answer was not responsive. 'I don't care how it would be; I am asking was there any at all'. The witness answers, 'I never noticed any.' Still not content with the examination counsel asks again, 'You would not say there was or was not?'

(Tr. pp. 180-181).

The witness has answered every question, and, pressed on by another question, endeavors as a layman will to ascertain what is intended and to cover the same. He answers, as a conclusive effort to express his views, 'No, I would not. I know there was nothing said about any smell that day.' The answer in the first three words was directly responsive and the last represented merely a layman's effort to grasp the situation and meet it, and yet counsel rebukes the witness and asks him to answer the question, though the witness has done so, and the court, *without protecting the witness to the extent that he had answered* the question, sustains plaintiffs throughout, and *reprimands the witness.*

'Yes, don't volunteer any information.' Note that the court does not call attention to the fact that the objection as made was not well taken, but that a motion to strike out part of the answer might be sustained on the ground that the witness had answered the

> question and then had added more, which the court would choose to declare volunteered. The court's ruling is entirely in favor of the plaintiff and against the witness and is accompanied by a sharp rebuke for mere unintentional, natural, technical misconduct of a layman as a witness (Tr. p. 181). The effect on the jury could not have been but adverse."
>
> (Brief, pp. 28, 29 and 30).

The most remarkable feature of this occurrence is that no objection was made and no exception was preserved.

Lastly on this subject, for so it is stated in counsel's brief, complaint is made because of his inability to go into details as to how and why and for what reason the witness Hamilton knew that the carcass did not emit any odor. We have heretofore in this brief given the testimony in its entirety as to this matter, and refrain from doing so now.

Counsel advises us that at this stage of the proceedings he did not even dare to more than scarcely approach the subject in hand, and that worn out by the course of the trial he appealed to the court to trust him this particular time, but that the court simply "scolded" and commented harshly and improperly on the witness' former testimony, and handled questions of fact for the jury as decisions of law to be made by the court as to the weight of the evidence. (Tr. p. 35).

A reference to the transcript disclosing this occurrence shows that counsel does himself injus-

tice, for after the scene closes and after everything that he seeks to elicit is elicited, he gets the witness to testify as follows:

> "I do not know of any instances where a horse, or horses have been frightened by the carcass of another animal to such an extent that they have run away. I was prospecting for gravel, and I met bones, piles of bones there. They didn't scare my horse there at all, but if there was a moving piece of paper or glass, or anything of that kind, my horse would get scared, but didn't get scared of any bones."
>
> (Tr. p. 195).

MISCELLANEOUS MATTERS.

Under this heading, and still dealing with the court's misconduct, we encounter an episode in connection with the testimony of Mr. Bigelow. Upon the first trial of the case when the fatal variance was urged, on the proof submitted, which substantially was the proof submitted in the instant trial, Mr. Bigelow testified. He was absent from the state when the instant trial took place, and his testimony on the former trial was used. In connection with its use the record shows the following:

> "Thereupon it was stipulated between the parties that the driver Bigelow was not now in the state of Montana and was probably in the state of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial. Thereupon counsel for plaintiff offered to read said

transcript of the testimony of the said driver Bigelow, but the defendant objected thereto on the ground that the said testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial, the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available and whether he would admit that impeaching testimony existed, but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat and indicated the places referred to on the plat by such expressions as 'here' and 'there' pointing to the plat, and the meaning of such references are now lost, which objections were by the court overruled, to which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 81 and 82).

The witness had made a statement to the claim agent of the defendant company regarding the runaway and his attention was called to same on cross-examination. The testimony relating thereto is as follows:

"Thereupon there was offered and received in evidence a written statement signed by the

witness and referred to in this testimony reading as follows:

"A small piece of paper on a bush fluttered considerably close to this crossing which frightened the team. This was about at the bottom of the hill referred to. I had just got the team quieted down when we reached the fill or approach to the track. At that moment the wind blew the odor from the dead carcass right toward them, which frightened the team, so that they became unmanageable and ran away. As to whether as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control. I had a tight hold on them in case I thought I had control over them enough to hold them. No, as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control. No, sir. I had not been drinking any that day. As to whether I am a drinking man, yes, sir. I take a drink. I was not drinking intoxicating liquors prior to that time to excess.

Q. Do you remember at any time or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?

By General Nolan: I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.

By the Court: Sustained.

By Mr. Veazey: We are not laying the foundation for impeachment, but are inquiring for evidence.

By General Nolan: Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except insofar as this statement

would be contradictory to anything he has said on the stand here.

By the Court: I will allow him to answer the question.

Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass?

A. No, sir."

(Tr. pp. 92-93.)

Before the first question above set forth, beginning with the words "Do you remember at any time or did you at any time," etc., was read counsel for the defendant advised the court that the defendant desired to withdraw said question and to waive it, and advised the court that if the witness were present an impeaching question would be propounded, since impeaching testimony was not available, and defendant demanded that the witness be produced in order that an impeaching question might be propounded, but the court declined to allow said question to be withdrawn or the answer thereto to be withdrawn. To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon noted and allowed, and the court, likewise, overruled the demand of the defendant that said witness be produced, to which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript containing the objection to said question and the

court's ruling sustaining said objection and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence was read, counsel for defendant advised the court that defendant desired to withdraw said disclaimer; that it was not laying the foundation for impeachment and counsel stated that at the time of the former trial, the defendant did not have any impeaching testimony, and was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement on impeaching testimony, but that since then, impeaching testimony had been procured and defendant desired, therefore, to withdraw said disclaimer, and to impeach the witness.

> "By the Court: The court will not permit it. Now we will hear what the witness has to say and bring that up later.
>
> To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."
>
> (Tr. pp. 92-95).

These proceedings are referred to as indicating hostility on the part of the court. As to the correctness of the court's ruling on this, we will discuss it at a later time. We present the transaction here and give it in its entirety for the purpose of showing that it does not present any evidence of the judge's unfriendliness, and that in the occurrence itself, there is nothing in what transpired to justify the claim that the court's rulings or the

language in which they were embodied, contained anything to indicate hostility. If the demands of counsel were warranted, under the law, then error was committed, and the rights of the plaintiff in error are amply protected. The correctness or incorrectness of the rulings are subject to review on appeal. We make the point, however, that these rulings, adverse to the contentions of plaintiff in error should not be made the basis of a criticism, that because these rulings were made, the trial court evinced feelings of hostility or unfriendliness towards the plaintiff in error. In the colloquy which took place between counsel and the court, wherein counsel complained of being at a disadvantage because the witness was not present, so that an impeaching question might be put to him, the court said:

> "*You disclaimed* any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. *You expressly said* it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is not the fault of the other side. *Even the best cases* (to say nothing of the case of the defendant in this instance) *are sometimes lost* because testimony cannot be produced."
>
> (Brief of plaintiff in error, p. 40).

We note in the excerpt as it appears in the brief that certain portions of same are italicized. For what reason and on what basis, we are unable to say. At any rate, this declaration by the court is referred to as evidencing hostility.

The language in the transcript does not reveal how it was spoken. It is silent on the score of infliction and emphasis. The learned counsel seemingly desires reproducing it in his brief to supply these omissions.

The stipulation which showed that the witness was beyond the jurisdiction of the court rendered admissible Mr. Bigelow's testimony given at the former trial. This testimony was in the nature of a deposition. At first blush, it would seem at least that the objections to its use bordered on the frivolous. The demand that the court produce the witness, so that an impeaching question might be propounded, at first blush, at least would seem to border on the ridiculous.

Why should the court remain silent when these demands were made? Can language more temperate be imagined, a compliance with such demands being insisted upon. We repeat again that this record shows remarkable judicial patience and equanimity.

We are justified in saying in this connection, too, that counsel knew before the trial that this evidence would be used. He was advised that by reason of the witness being in Dakota the evidence would be used. The suggestion in the brief that the witness might have been sent there, so as to be absent from the trial is unwarranted under the facts. The defendants in error did not know that counsel for the plaintiff in error had in seclusion this impeaching question. Having

this impeaching question in reserve there was nothing to prevent counsel from taking the deposition of Bigelow in Dakota, so that a proper foundation might be laid for the impeaching question.

We submit that there is a good deal of pyrotechnics about this whole matter.

And lastly some language of the court is complained of in a colloquy which took place between the court and counsel as to the law which would govern the relation of master and servant as applied to the instant case, and as to whether Bigelow's negligence in driving the team would be imputed to Dr. Ennis. After hearing counsel in argument on some of the matters incorporated in his motion the court declined to hear argument on the question that Bigelow's negligence would proclude recovery, remarking "Oh, everybody knows that." This language is objected to because of its injurious effect upon the jury. The record does not disclose the fact that the jurors were present. Even if they were, how could they be influenced by this remark?

Counsel now says that this is a disputed question: The record does not show in the colloquy in question any overwhelming desire to advise the court that it was a question on which courts of eminent respectability differed, probably not, however, with the facts such as they were in the instant case. The Montana authority referred to favorable to appellant's contention and in line

with his suggestion has repeatedly received merited adverse criticism from other courts, and it is a question as to whether the doctrine of the particular case has not been modified if not overthrown by subsequent declarations of the same court.

We refer to the case of

Whittaker v. City of Helena, 14 Mont. 124.

We have probably with unnecessary prolixity reviewed the remarks of the learned counsel directed to the misconduct of the court.

We did so because we feel the castigations are unmerited and undeserved.

The writer appreciates, and so we believe the able counsel representing the plaintiff in error, that Judge Bourquin transacts business with celerity and dispatch. Of him, as much as any judge exercising judicial functions today, it can be truthfully said, that he plays "ball all the time." It is this characteristic which enables him to handle the large volume of business which he does, and it is this characteristic which enabled him, since his accession to the bench, to dispose of an accumulated and congested docket, so that now instead of waiting for years before a case would be reached, the litigant by reason of the up-to-date condition of the docket may obtain a trial when the case is at issue. We have no brief to sing the praises of Judge Bourquin in these proceedings, but we feel constrained to say this, be-

cause in the record before us he shows evidence of a disposition to keep things moving.

But after all is said and done, what is there on this branch of the case which is subject to review? The case is here on a writ of error. Is the court's language objected to and an exception saved? And was the court, in connection with the language used, asked to retract same? Under the state practice, the misconduct of the court, in the particulars referred to, is generally shown by affidavit. At any rate, so that the court's action may be subject to review, it is necessary that the court should be called upon to do something or refrain from doing something, and its failure in these particulars should be excepted to. Nothing of the kind appears here.

We respectfully submit that the fate of this case will depend, not on the misconduct of the court resting on vague imaginings, but as to whether or not errors have been committed in the trial of the case operating to the prejudice of the appellant.

The learned trial judge reviewed all these complaints when the motion for a new trial was overruled. The decision, while not in the transcript, has been certified to this court, and this court's attention is respectfully invited to same.

PLAINTIFF'S EFFORT TO REPUDIATE ELECTION MADE.

We have heretofore discussed this matter. The amended pleadings were filed from time to time

as objections were hurled at them and agreeably to the court's order. This being true, we do not understand the force of the deduction which appears at page 58 of appellant's brief, as follows:

> "Therefore, the motions to strike portions of the first and second amended complaints, notwithstanding the disclaimer of counsel then made, should have been sustained, and the court erred in submitting the cause on the basis of the roadway being a public highway by estoppel, and in not submitting the cause on the basis of the roadway being a mere invited or licensed way."

Whether the roadway was a highway by estoppel or whether it was a roadway to which the public were invited, in what respect was appellant prejudiced. There is even no basis for this contention that the defendants in error shifted positions. The proofs available were always the same. The proof first presented under the allegation in the first complaint that this road was a pubic highway differed in no particular from the proof presented by the record. In the first place, plaintiffs alleged that this was a public highway and upon presenting the proof, they were told that there was a fatal variance. In the succeeding pleadings they alleged the facts and insisted that on those facts which were uncontradicted, the railway company owed to those using the roadway the duty of exercising ordinary care.

Indeed the court expressly told the jury that the roadway was not a legal highway, in that it had not been laid out by the county with all the

requirements of the law. The jury were told, however, that the conditions attendant upon its use, were such that the obligations resting upon the railway company were the same as if it were a public highway. (Tr. p. 218).

Suppose that instead of setting up the facts in detail as to the use of this road, we simply alleged that the roadway was one by invitation, to what extent would plaintiff in error be benefited. Not so by the admission or exclusion of proof. Not so by changed instructions prescribing changed obligations and duties. In both cases, the proof would be the same and in both cases the measure of duty would be the same.

We quote as follows from the case of

Hanson v. Spokane Valley Land & Water Co., 107 Pac. 864:

> "While the complaint alleges that the road was a private road and way of necessity, it also alleges in that same connection, that the road was traveled over by the public generally, constantly, and daily for some years prior to January 1, 1908. The effect of these allegations is that the road was a public way over private land. The whole allegation taken together could mean nothing else. It is not claimed that the plaintiff was the owner of the way, but he certainly had the same right as any of the public to use it. While the complaint does not directly allege an invitation to the public, it appears that the public made use of the way for 'some years prior to January 1, 1908,' and that the way connected with the public highway on the north of section 4. This amounts to an implied invitation, be-

cause public user, long continued, will imply an invitation. (Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478). Or it may be implied when an owner by acts or conduct leads another to believe that the land was intended to be used as he used it, and that such use is not only acquiesced in by the owners, but is in accordance with the intention or design for which the way was adapted or allowed to be used. (Turess v. N. Y. S. &. W. R. Co., 61 N. J. Law, 314, 40 Atl., 614. It follows, therefore, that the respondent was not a mere licensee. He was an invitee under the alleged facts. Such invitation would continue so long as the way remained open and the public availed itself of such use, and while continued, the owners and others would be liable the same as though such road were regularly laid out and owned by the public."

In the case of

Midland Valley R. Co. v. Shores, 136 Pac. 157, 49 L. R. A. (N. S.) 814,

the court said

"There is abundant authority to the effect that a railroad crossing may not be upon a public highway, yet, if the track has been used by travelers as a public crossing for a long time with the knowledge of the company, and without objection, and the company has treated the same as a public crossing, it will be presumed to be such, and the railway company will be bound to exercise ordinary care to prevent injury to persons using the same. The above rule is approved in 2 Elliott on Roads & Streets, Sec. 1019, where the authorities will be found collected in a footnote. * * * A case in point which illustrates the rule as well as any we have been able to find is Webb v. Portland & K. R.

> Co. 57 Me. 117, wherein it was held that 'in the trial of an action for an injury alleged to have been received while passing along a 'public street and highway across the railroad track of the defendants' if the evidence of a legal location is wanting, it is proper to instruct the jury that there was no legal highway by reason of any proper location, but that, if the jury should find that with the consent of the company owning the track and having the right of passage there with trains, and of the owners of the fee in the land there had been a thoroughfare in open and continuous use by the public, and all who had occasion to go between the termini mentioned, and that use commenced prior to the running of the defendants' trains there, and continued to the time of the accident without objection made by the company owning the track, or the owners of the fee, or the defendants, they might thence infer the existence of such a way and right of crossing the railroad at grade there, as would bind the defendants to the use of the same precautions, prudence, care and diligence in running their engines as they would be bound to exercise if a highway had been located across the track there at grade."

But why continue the discussion of this point further. The instructions defining the measure of duty were not objected to.

We respectfully submit that as to this contention, the learned counsel representing the plaintiff in error is adding insult to injury. In the first trial he got the court to hold there was a variance because the proof showed that Mrs. Ennis was an invitee, and succeeded in forcing a continu-

ance of the trial. Confessedly, the measure of duty was the same, and now, when the facts are pleaded which were before the court then, it is suggested that instead of Mrs. Ennis being an invitee, she was using a public highway, made so by estoppel. This designation is a new one, at least, in Montana. In that state, we have public highways, whose existence, from the standpoint of the plaintiff in error depends upon a strict compliance with the law, and we have highways by prescription.

We submit that in this case, however, the roadway may be characterized; the company owed the user the duty of exercising reasonable care in reference to it, and owed the user the duty of not maintaining a nuisance through the presence there of a malodorous carcass.

No Negligence of Defendant.

Under this heading, it is contended first that the proof failed to show that the object was one which would frighten horses of ordinary gentleness, and second, that the proof showed that the carcass was between the road fences, and thus on a part of a roadway, and, therefore, on the theory that the road was a public highway, the county and not the defendant would be liable.

First, as to the insufficiency of the complaint and of the proof as to the carcass frightening animals of ordinary gentleness;

The suggestion is made that the complaint is fatally defective, because of the absence of an

averment, that the carcass was such as was likely to frighten horses of ordinary gentleness. This objection to the complaint on this score is presented for the first time in the brief. While it is true that a general demurrer was interposed and a general objection was made to the admission of evidence because the complaint didn't state a cause of action, we submit that the court will not look with favor on this objection presented for the first time in this court, even though the court should be inclined to hold that the complaint should contain this averment. No authorities are cited in appellant's brief to support the contention that the complaint is fatally defective because of the absence of this averment. Indeed, the courts hold uniformly and universally to the contrary. Assuming, however, for the sake of the argument that such an averment should appear in the complaint, the case was tried upon the theory that that was the test, and the instructions which were given to the jury made that the test, so that the plaintiff in error cannot now complain because of the absence of the averment from the complaint.

In the case of

> Baltimore, etc. R. R. Co. v. Slaughter, 167 Ind. 330, 79 N. E. 186, 119 Am. St. Rep. 503,

the court said:

> "The next objection which appellant's counsel urge against the complaint is that it fails to aver that the handcar and articles thereon were calculated to frighten horses of

> ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically alleged. It is charged that the defendant carelessly and negligently placed said handcar lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said handcar and also that the accident and injuries set forth were caused by, and were the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this state and elsewhere, that in complaints or declarations for negligence it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion; it cannot be taken advantage of by demurrer."

There is an extensive note to the case of King v. Ore. Short Line R. R. Co., 59 L. R. A. 209, where this subject in general terms is discussed. And at page 230 cases are cited which refer to the specific subject now under consideration (frightening horses).

After verdict the complaint is to be considered with regard to the proof rather than its strict allegations.

Johnson v. Ryan, 112 Pac. 1114.

We submit that plaintiff in error remaining silent as to this alleged defect is not now in a very advantageous position to urge that the complaint

should contain this averment, suggesting its materiality for the first time in this court.

Sufficiency of Proof.

Plaintiff in error contends that the proof is insufficient to show that the carcass in the condition in which it was, emitting the odor which it did, would frighten horses of ordinary gentleness. Mr. Ennis testified that he owned the team that ran away about six weeks before the runaway, and had seen the team for about six months before that; that he drove them a good deal, and that anybody might drive them; that they were broken and gentle. (Tr. p. 66). That he learned of the existence of the carcass in January, 1909; that when he first saw it it was burned. (Tr. p. 67.) That he saw the carcass after that frequently. (Tr. p. 69). He last saw it on Thursday preceding the Sunday when the accident occurred. (Tr. p. 68). That he had been driving those horses back and forth there about four or five weeks before the accident. (Tr. p. 68), and didn't have any trouble at any time. (Tr. p. 68). That he noticed the carcass there after it got warm weather, and that about the first of April he noticed there was some smell from the carcass, and that it got stronger as it grew later in the month. (Tr. p. 68). That the carcass in the condition in which it was would have a tendency to frighten horses, and it always does. (Tr. p. 69).

On cross-examination he testified that he told

Mr. Bigelow about the horses being skittish at the carcass after it began to smell. (Tr. p. 75).

Mr. Bigelow testified on this subject, stating that the team was gentle and tractable. (Tr. p. 84), and speaking about the carcass, said that it emitted odor on the day of the accident. (Tr. p. 84). That on going to Bainville the horses shied a little, and outside of that he had no trouble with the team. (Tr. p. 85). That on returning, there was a steep rise, and when the team reached the crest of the little hill, the carcass came suddenly into view, and the wind was blowing from the southeast, and the team lurched and shied around, so that he could not control them. (Tr. p. 86). That the carcass of a horse is an object which is likely to frighten a horse to such an extent that he will run away. (Tr. p. 88). That although this object was likely to frighten horses and cause them to run away, he didn't expect the team to run away at this time, because he thought he was horseman enough to handle these horses. (Tr. p. 88).

Mrs. Charles Allison testified before the accident she had occasion to cross at this crossing almost every day, and that the odor from the carcass was strong enough, so that people crossing could notice it. (Tr. p. 100). That the runaway team was a gentle team (Tr. p. 100). On cross-examination she testified that sometimes she drove a team and sometimes a horse across there, and noticed the odor from the carcass, and that the horses would always be frightened. (Tr. p.

104). That the presence of the carcass there would ordinarily frighten horses, but as to whether she would expect it to frighten horses to such an extent as to make them run away, she was always afraid to cross there, and someone drove her horses. (Tr. p. 106). They didn't run away. (Tr. p. 107).

Mrs. Katie Meinhardt, who drove the runaway team with Mrs. Ennis from Bainville to the Hubener farm on the day of the accident, testified that the team was perfectly gentle.

R. H. Sweetman testified that when driving over this crossing, his horses noticed the carcass, and that he had trouble with one team in crossing there on account of the carcass; that when the horses got on the track they saw the carcass and stopped, and he had to whip them to get them off the track; that the flesh was partly removed from the bones of the carcass. (Tr. p. 114).

Charles N. Bain testified that in going back and forth he noticed the odor from the carcass and during the month of April it smelled pretty strong. (Tr. p. 120). That he had considerable experience in handling horses, and that the smell from a carcass would have a tendency to frighten horses.

Fred Swan testified that the carcass as he crossed there gave forth odor at times if the wind was in the right direction; that when he crossed there he was riding a saddle horse, and that he

would always shy around, and that his horse was considered a very gentle horse. (Tr. p. 25).

The testimony adduced in behalf of the defendant was to the effect that there was no odor at all, and that the carcass of a horse would have no effect upon horses in the way of frightening them. How, in the light of this evidence, can it be urged that the proof failed to show that the carcass would not frighten gentle horses?

It is also contended under this heading that the county was responsible and not the defendant company, and in this connection it is urged that someone most likely forced the animal on the track ahead of an on-coming train, and with sublime confidence we are asked to cite some authority to the effect that one whose negligence is not shown to have contributed to the creation of a nuisance on a highway can, without fault on his part, be placed in fault for not abating the nuisance, which first arose without his fault.

The proof shows that the carcass was on the right of way of the defendant company. (Tr. p. 74).

John Hamilton, the foreman of the section, testified as follows:

> "I started to prospect for gravel the same day the horse got killed. I saw the horse there that same day. It was discovered in the morning about seven or eight o'clock. The horse was then dead. I had been over that place the day before about half past four or four o'clock. There was nothing there then.

> I made an examination of the horse the next morning at half past eight o'clock. The horse was cut on the hip. The skin was broken. The horse was about sixteen or seventeen feet on the outside of the rail. The horse lay between the space between the wind fence and the cattle-guard. I don't know exactly how far up. I would say it was about ten feet from the cattle-guards. Trains passed through there in the night time. During the night preceding the morning when I first saw this carcass on this roadway there were two passenger trains during the night and several freight trains—I don't know how many."
> (Tr. pp. 126-127).

In addition to this testimony, the witness directed the foreman to make a report that the horse was killed by the railroad, and thereafter repeated efforts were made by the railway company to destroy the carcass. Those efforts, or some of them at least, were under the direction of the assistant road master. (Tr. p. 129).

On this proof we submit that it was a question for the jury to say whether or not the horse was killed by the defendant company.

Thompson on Negligence lays down the rule as to the sufficiency of the proof in cases of this kind, as follows:

> Sec. 2194: "As to the evidence necessary to sustain an allegation of injury * * * it is sufficient that it appears that the animals were found on the side of the railroad track 'badly smashed up' and that no other reasonable cause could be assigned for the casualty, though no one saw the locomotive strike them. The jury, under such circumstances,

are at liberty to infer that the injury was caused by the cars or locomotive of the defendant."

In an action against a railroad company to recover for a cow alleged to have been killed by the negligence of the railway company, the evidence showed that the cow had been turned out by the plaintiff on a common near the railroad track to graze; was found in a ditch near the track with two legs broken, the land on both sides of the track belonging to the railroad company; it was held that the evidence was sufficient to justify the submission of the case to the jury.

Rowe v. Greenfield Co., 7 S. C. 167.

A mule was found the day after the alleged injury with an eye knocked out and a jaw bone broken. The plaintiff tracked the animal to the defendant's track and at the foot of a grade near a trestle found evidence of where the mule had been knocked off or had fallen down from the track, and had found hair from the mule and blood on ties, and at the foot of the embankment where the mule had evidently been lying, tracks of a mule were also found on the railroad track extending for a distance of seventy-five yards north of where the mule was alleged to have been knocked from the track. It was held that the evidence was sufficient to take the case to the jury.

Johnson v. Hill, 39 So. 780.

We insist, however, that regardless of whether the company killed the animal, a liability exists

on the part of the railroad company on account of maintaining on its property a public nuisance. It is suggested, however, that we have proceeded upon the theory that the roadway in question was a highway by estoppel. We have already referred to this contention. On the first trial, at the instance of the plaintiff in error, we were prevented from recovering upon the basis that the highway was a pubic highway, and that the land belonged to the railroad company, and that the use of the public road was an invited use. This apparently is the contention of the defendant company; this is the theory upon which the case was tried.

If the defendant company maintained on its premises the carcass of a horse, so that it emitted offensive odors, it maintained a nuisance, and for injuries done thereby, it is liable. In the second amended complaint it is alleged, paragraph I:

> "That at all times hereinafter mentioned, the defendant Great Northern Railway Company was and is a corporation, organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said state, and at all of said times owned, in connection wth said railway, a right of way, which right of way, at the place hereinafter referred to, as used for a roadway and as the place where the runaway hereinafter referred to occurred, embraces a strip of ground about seventy-five feet wide on each

side of the track, running parallel to said track."

(Tr. pp. 7-8).

In paragraph III. it is alleged that the roadway crossed this right of way. In paragraph VII. it is alleged that the defendant company invited the public to use this roadway, and paragraph VIII. is as follows:

"Plaintiffs further aver that during the month of December, 1908, the defendant company placed, and caused to be placed on its said right of way and in close proximity to said traveled roadway, and in such position so that it could readily be seen by animals traveling on said roadway, as it crossed said right of way, the carcass of a horse."

(Tr. p. 11).

And in paragraph IX. it is averred that the defendant company negligently permitted the carcass to remain where it was so placed from the month of December, 1908, until the 18th day of April, 1909, and that for more than a month prior to the 18th day of April, 1909, the carcass suffering decomposition, exhaled noxious and putrid odors, so that it became a public nuisance and became an object likely to frighten teams driven along said roadway.

The answer to this complaint admits the allegations of paragraph I. Admits that the roadway crossed the right of way, and admits that the carcass lay near where Nettie Ennis and John Bigelow attempted to drive across the railroad track.

Thus, it will be seen that by the pleading, it is

admitted that the carcass was on the right of way of the defendant company.

But, independently of these admissions, the proof shows this beyond doubt. Mr. Ennis testified that the carcass lay alongside the track about twenty-five feet from the track east of the driveway, which crossed the railroad track; that the carcass was not far from the traveled road; that it was about twelve or fourteen feet from the driveway on the right hand side.

And Mr. Hamilton testified that the carcass was about sixteen feet from the outside rail, and about twenty feet from the traveled portion of the roadway. (Tr. p. 128).

The carcass remained upon the premises of the defendant company from early in January until the accident occurred. Three efforts were made by the defendant company to dispose of the carcass by burning same, and through the joint action of the burning and the gnawing of animals, wild and domestic, it remained there with the skeleton intact and with the flesh adjacent to the ground emitting odors for more than a month—emitting odors of the most offensive character. These odors were so pronounced in type and offensive in character that they were alike objectionable to man and beast. This carcass, under the circumstances, was a public nuisance, and for injury due to its existence, the defendant railroad company became responsible.

Section 6162 of the Revised Codes of Montana provides:

> "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway, is a nuisance."

Section 6163 of the Revised Codes of Montana provides:

> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."
>
> "Depositing anything upon one's own land, which emits an offensive or unwholesome smell, that floats over the lands of another, producing unreasonable annoyance or discomfort, or that it is productive of deleterious consequences, is an actionable nuisance, as manure, decayed vegetables, dead animals, or anything that produces injurious results in the manner named."
>
> Wood on Nuisances, 3rd ed., Sec. 115.

In the case of

City of Richmond v. Caruthers, 50 S. E. 265,

the court said:

> "As long as property is not immediately dangerous or offensive, it cannot be treated as a nuisance per se. This principle is well illustrated by the law regarding the disposal of carcasses of dead animals. They are li-

able to become nuisances and if not cared for may be treated as such."

And in the case of

Ellis v. Kansas City, etc. Ry. Co., 63 Mo. 131, 21 Am. Rep. 436,

the court said:

"The defendant in permitting the horse killed by its locomotive to remain on the side of the track so near the house occupied by plaintiff and her husband as to render her occupancy unwholesome, was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house."

We submit, then, that the existence of this carcass within a few feet of a traveled roadway used by the public generally and upon the premises of the defendant company constituted a nuisance and for the injuries occasioned by it, the company was responsible.

DEFENDANT'S NEGLIGENCE NOT A LEGAL CAUSE.

Under this heading, the doctrine of the last clear chance is invoked. By a strained process of reasoning, the distinguished counsel representing the plaintiff in error, reaches the conclusion that, although the company was negligent and although the company created this nuisance and continued same upon its property, because the defendant in error, Mrs. Ennis, knew this, and the driver Bigelow knew this, no recovery can be had. In other words, it is stated that they had the last clear chance; that they could travel some other road; that they could abate the nuisance or they could direct the section man to do this, and be-

cause they didn't do those things, the doctrine of the last clear chance can be successfully invoked against them; and this, it is said, on the authority of Davis v. Mann, 10 M. & W. 546, and Butterfield v. Forester, 11 East. 60, cited in appellant's brief. From the fact that the principle invoked, which we confess is novel, and illogical, finds foundation in the cases referred to, it may be well to ascertain at the outset what these cases hold.

In the case of Davis v. Mann, the defendant negligently drove a horse which he rode against an ass negligently left fettered on the highway. The doctrine was declared as follows:

> "A plaintiff is not precluded from recovering for an injury negligently done by a defendant, by the fact that he himself has been guilty of unlawful or negligent conduct, unless he might, by the exercise of ordinary care at the time, have avoided the injury."

And in the case of Butterfield v. Forester, the plaintiff was thrown down while riding along a highway, by reason of encountering an obstruction which he might have seen and avoided. He was driving as fast as his horse would go through the streets of a town, and the evidence showed that if he used ordinary care, he would have seen the obstruction. The court held that the accident occurred entirely through his own fault, and, therefore, the action could not be maintained.

It will be noted that in the cases referred to, the defense was that of contributory negligence, and in its consideration, the doctrine of the last clear

chance did not arise. The doctrine of the last clear chance, as invoked, is invoked by the injured party rather than by the party who inflicts the injury. In the case of

Dahmer v. Northern Pacific Ry. Co., 48 Mont. 161, the Supreme Court of Montana considered this doctrine, using the following language:

> "It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, sec. 228). A case calling for its application embodies three elements, viz: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by the law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered. It is nothing more than a qualification, by way of exception, to the general rule that negligence on the part of plaintiff which

> proximately contributes to his injury will bar his recovery. So the rule is understood and applied by the courts generally."

Reference in the brief of plaintiff in error is made to Cyc. Volumes 28, 29 and 37, where it is said cases will be found to sustain the contentions of counsel. If by that is meant that cases will be found, that contributory negligence on the part of the complainant will bar recovery except where the last clear chance doctrine applies, we readily assent. If, however, it is meant that cases will be found which in the instant case would impose a duty upon the defendants in error as a condition precedent to recovery that they should take a shovel and go upon defendant's premises and bury the carcass, or that they should make complaint to the railway company as to the disposition to be made of the carcass, or that they should go out of their way two or three miles so as not to use this roadway, or that they should hunt up the section foreman and have him bury the carcass, as suggested by plaintiff in error, then we emphatically dissent. We do so, recognizing fully the rule that if the conditions were such that Mr. Bigelow, as a reasonable man and in the exercise of reasonable care, should not use the crossing, the danger in doing so being imminent, no recovery could be had. In other words, in this case the proposition is presented as to whether the conditions were such as to make it rashness on the part of Mr. Bigelow to drive the team over this crossing.

If this is the case, then and in that event, and only in that event, should the verdict be set aside. Courts take judicial notice of the fact that horses shy at objects quite frequently, or to use the language used by the witnesses who testified in relation to the matter, "they get frightened." It does not necessarily follow because a horse gets frightened that the horse will run away. If unchecked and uncontrolled, a runaway might occur, but a driver through agencies under his control, in most cases, can prevent such an occurrence. Surely, counsel would not contend that in the case of a defect in a street, a pedestrian should thereupon, before using the street, remove the defect himself, or request the municipal authorities to do so, at the risk of not being able to recover should he be injured, when as a reasonable man he would be justified in thinking that he could safely use the street in its defective condition in safety to himself. Surely it will not be contended that one driving a team in a city, and seeing boxes negligently piled in front of a store on the sidewalk, and knowng that boxes so piled would have a tendency to frighten his horses, and knowing, likewise, that though his horses became frightened, he could easily check them, that the driver in such a case would be compelled to tie his team at some hitching post before reaching the boxes and go forward and remove them or ask the store-keeper to do so, or take some other street where these conditions would not confront him, at the as-

sumed risk of driving his team beyond the boxes. We may, then, borrowing a word from the learned counsel for the plaintiff in error, suggest, in the consideration of this proposition, that we remove from the discussion the "glamour" of the last clear chance, and consider the question presented as to whether, in using the roadway, the defendants in error were guilty of contributory negligence. Instructions covering this feature from the standpoint of the plaintiff in error were requested as follows:

> "No. 2A. You are instructed that even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant railway company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence even if said defendant was negligent as aforesaid, such negligence, if any was but a condition or circumstance of the runaway and not a proximate cause thereof and the death of the deceased was not proximately caused by such negligence if any."
>
> (Tr. p. 203.)
>
> 'No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Com-

pany was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care, to avoid such negliegnce, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any."

(Tr. p. 203.)

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place, and is no longer present, and someone approaches such place and discovers, or by the exercise of reasonable diligence might have discovered, the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance."

(Tr. p. 204.)

"No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place, and then leaves that place and is no longer present, and some-

one approaches such place and discovers the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance."

(Tr. p. 205.)

"No. 2E. Even if yon find that the defendant railway company was negligent in any of the matters complained of, nevertheless you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew, or discovered, or in the exercise of reasonable care should have known or discovered, said negligence, if any, of said defendant, and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering, or having the means of discovering, that another has been negligent, entitled to thrust himself upon the negligence of another, or blindly refuse to discover the negligence of another, and if he does so, it is, in law, his own act or omission, and not the negligence of the defendant, which is the proximate cause of the injury."

(Tr. p. 206.)

"No. 2F. If you find from the evidence that the defendant railway company placed, or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew of and discovered said negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof."

(Tr. p. 207.)

These instructions were refused. The court's attention was directed to its omission to give these instructions by counsel for plaintiff in error as follows:

"Your Honor has limited the issue of contributory negligence to the manner of driving and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

> By the Court: In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road, by placing the carcass there you cannot foreclose him from using that road."
> (Tr. p. 235.)

We have heretofore set out in detail the evidence on this point. Suffice it to say, that the evidence in behalf of the plaintiffs tended to show that the carcass, in the condition in which it was, was an object likely to frighten horses, and the testimony of the defendant tended to show that the carcass would not have any effect whatsoever upon the horses, and would, in no manner, tend to frighten them. This being the state of the evidence, the law did not require the user of the roadway to take some other road. He would only be required to do this, if, as a reasonable man, he should conclude that a runaway was likely to occur, and there is no evidence to justify this assumption. The most that Bigelow could expect was that the horses might shy or become frightened.

Thompson on Negligence, Sec. 6265, declares the following rule:

> "The doctrine under this head, found in most of the cases cited in the preceding sections, was well stated by the Supreme Court of Pennsylvania thus: 'When a highway is obstructed, the passer along it is bound to the observance of ordinary care; that is, such care as a reasonably prudent man would exercise to preserve himself and property from injury,—just the same degree, but heightened

> in intensity, as would be observed in ordinary circumstances.' The rule is general, therefore, that a person having knowledge of a defect or obstruction is bound to use care according to the circumstances to avoid injury to himself or property. Accordingly, if the obstruction or defect in the highway is of such a nature that it would be consistent with reasonable care to attempt to pass by it, one using the highway is entitled to make the attempt."

And in the case of

> County Commissioners v. Burgess, 61 Md. 29,

it was held that because a traveller on a public road knowing that a bridge had a hole in it, and was unsafe his using same would not bar his right to recover, the court saying:

> "In this case it does not appear from the proof that the bridge was wholly impassable. It was unsafe and had a hole in it, into which the appellee's horse fell and was injured. The simple fact of its existence with the knowledge of the plaintiff was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part, but the *onus* of showing that such care and prudence was not exercised still rested on the defendants."

The doctrine invoked at the trial, as indicated by the instructions referred to, elaborated upon now, demanded that the driver should have taken

some other road, upon the principle that where there are two ways of doing a thing, one dangerous and the other safe, choosing the dangerous way constitutes contributory negligence.

Cyc. discusses this proposition under the heading "Choice between alternatives involving risks," Vol. 29, page 520. In the text the doctrine is stated as follows:

> "If two ways are open to a person to use, one safe and the other *dangerous,* the choice of the dangerous way, with knowledge of the dangerous condition, constitutes contributory negligence." (Italics ours.)

Labatt on Master and Servant (1st Ed.) vol. 1, Sec. 333. discussing this principle in its application to the relation of master and servant uses the following language:

> "The rule thus laid down is evidently intended to be applied only when the method adopted was essentially unsafe, and the other was apparently safe. It will be observed that this conception emerges more or less distinctly in the statements of the rule already given. That is determines, whether expressly adverted to or not, the actual extent and scope of the rule is apparent from the consideration that a doctrine which should predicate negligence, as a matter of law, in cases where the servant is merely chargeable with having adopted the less safe of two courses which were both reasonably safe, would contravene the fundamental principle by which the standard of due care is declared to be the hypothetical conduct of a prudent person under the given circumstances."

How can such a rule be invoked here? We re-

peat again what has been said before. The evidence showed that the carcass, at most, would only tend to frighten horses, while the plaintiff in error resolutely insisted that no such frightening could occur. It was a question, then, on this evidence as to whether using the road constituted contributory negligence. We most confidently assert that the defendants in error had the legal right to use the road exercising reasonable care in so doing, and that the learned trial court was justified in holding that there was no evidence to justify the submission to the jury of the question as to whether the defendants in error were guilty of contributory negligence in not taking some other road.

We fail to see the persuasive force of the case of the District of Columbia v. Moulton, 182 U. S. 576, cited in appellant's brief, as applied to the instant case. There the roller was lawfully on the street, and in connection with its presence there, the district was in no manner in default. The court said "The roller being lawfully on the street the district was not bound to guard against the consequences of the voluntary attempt to drive by the roller."

The City of San Francisco would not be liable for a runaway team taking fright at a street car. The street car would be lawfully on the street. What kinship can be established between a case of that kind and the instant case? In the instant case the carcass was not lawfully beside the road-

way. In the instant case we have the element of negligent conduct in leaving the carcass where it was until it became a public nuisance.

RULINGS OF EVIDENCE.

HABITUAL USE OF LIQUOR BY THE DRIVER.

An inspection of most of the citations in appellant's brief have to do with cases where this character of evidence would, undoubtedly, be admissible, as where the incompetency of a fellow servant is the subject of investigation. In such a case, it would be important to ascertain what knowledge the master had as to the incompetency of the servant. Indeed, in cases of that kind, the general reputation of the fellow servant as to drinking proclivities could properly be resorted to. It would be a question, in such a case, as to whether the master had knowledge of the fact that the servant was addicted to this habit.

As to the admissibility of this character of evidence generally, the Court of Appeals of the Sixth District, in the case of

> Louisville & N. R. Co. v. M'Clish, 115 Fed. 268, has this to say:
>
> "4. Another proposition is much discussed in the briefs, and was the subject of oral argument. It involves the right of the defendant company to introduce evidence tending to show that the deceased was in the habit of jumping on trains near the place where the body was found. In the form in which the offer of proof in this branch of the case was made it is quite likely that the question sought

to be made was so involved with incompetent matter proposed to be proven at the same time that the alleged error in ruling upon it has not been properly brought into the record. As it has been thoroughly discussed and may be an important question in a new trial of the case, we have concluded to give our views upon it. The learned counsel for plaintiff in error admit the general rule to be that testimony offered for the purpose of establishing contributory negligence of the deceased, like other testimony, must be limited to proving facts existing at the time of the happening of the injury complained of. It is contended, however, that when there is no eyewitness to the occurrence, and the manner of its happening is to be left to circumstantial evidence alone, it is competent to show the habit of the deceased in the respect of doing the thing which it is claimed he did at the time of receiving his injury. The argument is, proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because the deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of the deceased at other times.

> We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation in the light of the facts competent to be directly or circumstantially proved."

In the case of

Thompson v. Bowie, 4 Wall, 463,

the court said:

> "All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev., Sec. 54. Bowie was not charged with fraud, nor with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

Judge Thayer, in the case of

Harriman v. Palace Car Co., 85 Fed. 353,

uses the following language:

> "When, therefore, a complaint does not charge incompetency, but simply alleges that an employe acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue."

Indeed, we find from an inspection of the cases that where evidence of this kind is at all admitted, it is admitted where the transaction, which is the subject of investigation, rests entirely upon circumstantial evidence.

We quote as follows from Encyclopaedia of Evidence on the subject of Intoxication, Vol. 7, pages 778-779:

> "Evidence of other instances of intoxication is inadmissible upon the question as to whether the party was intoxicated at the time alleged. So in actions for personal injuries where contributory negligence is alleged as a defense testimony relating to the injured party's habits as to temperance and sobriety is incompetent to show the probability of his being intoxicated at the time of the injury. Nor is evidence of intemperate habits or of the previous use of intoxicating liquors on the part of the party causing or contributing to the injury admissible on the question of his intoxication at the time. But evidence of intoxication at the time of the injury is always admissible on the question of contributory negligence. And where the intoxication at the time is admitted, plaintiff cannot prove his reputation for sobriety in rebuttal.
>
> ★ ★ ★
>
> The fact of habitual drunkenness raises no presumption that at the time of the doing of the act the person was intoxicated."

The language of the text is sustained by the references in the notes.

In the case of

Shelly v. Brunswick Traction Co., 48 Atl. 562, where this character of evidence was excluded, the court said:

"All of these questions were objected to and excluded, and exceptions taken. The evidence was not relevant. To prove that the plaintiff was intoxicated on previous occasions, or as the defendant's counsel puts it in his brief, was addicted to the use of intoxicating liquors, would not prove that he was intoxicated at the time of the accident, and to show that on previous occasions of intoxication he was in a helpless condition would not tend to show that on the occasion in question he was intoxicated to such a degree as to be helpless. It has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged."

And in the case of

Kingston v. Ft. Wayne & E. Ry. Co., 70 N. W. 315,

the court said, approving the doctrine announced in the case of Williams v. Edmunds, 75 Mich. 92:

"It was held that it was proper to show whether the servant who was alleged to have committed the injury was or was not sober at the time the injury was committed, it being a part of the res gestae, but that it was not proper to show his intoxication at other times, as it was raising a collateral issue." (Citing a large number of cases.)

As sustaining this doctrine, see, likewise:

Hubbard v. Inc. Town of Mason City, 14 N. W. 772;

Hill v. Snyder, 6 N. W. 674:
Langworthy v. Township of Green, 50 N. W. 130;
Lane v. Missouri Pac. Ry. Co., 33 S. W. 645.

In the instant case, we have witnesses testifying as to the condition of Bigelow. Some of those witnesses testified for the plaintiff and some of those witnesses testified for the defendant. This being true, we submit that the habits of the driver were too remote.

We submit, however, that even though this evidence was competent, there is enough of same in the record without contradiction, so that the plaintiff in error has suffered no injury on account of the portions excluded. Mr. Ennis testified upon cross-examination that Bigelow was a man who drank occasionally. (Tr. p. 78). Bigelow himself on cross-examination testified that he was a drinking man, but didn't drink intoxicating liquors prior to that time to excess. (Tr. p. 73). Mrs. Katie Meinhardt on cross-examination testified that the general reputation of Mr. Bigelow was that he drank to excess at times. (Tr. p. 111).

This evidence is in the record without contradiction, and there at the instance of the plaintiff in error. It might be pertinent to remark, too, that in the offers of proof, for the exclusion of which complaint is made, there is no suggestion that even though Mr. Bigelow was under the influence of liquor at the time of the runaway, his condition had anything to do with his inability to check or control the team. In order to make the

evidence available, it should be shown that the condition of the driver, by reason of being intoxicated, had something to do with the accident. It is elementary law that contributory negligence must, in some manner, conduce to the injury complained of.

We insist, however, that the evidence was inadmissible, and that the portions as to which complaint is made were properly excluded.

THE DRIVER'S INCONSISTENT STATEMENTS.

Under this heading counsel contends:

(a) That the deposition of the driver taken at the former trial should not be admitted;

(b) That although counsel, on the former trial, expressly disavowed any intention to impeach the witness in putting the question which was put, he should be permitted to withdraw disclaimer and impeach the witness, regardless of the fact that no impeaching questions were put to the witness;

(c) That the statements of Bigelow made at any time in reference to the runaway could be shown, and that the rule of hearsay evidence did'nt apply to them;

(d) That the right existed on his part to withdraw the questions that were put to Bigelow on cross-examination.

This, we believe, is a summary of the contentions under this heading. Before taking them up we desire to detail the facts which bring up for consideration these legal propositions:

The record shows in connection with the use of Bigelow's testimony the following:

> "Thereupon it was stipulated between the parties that the driver Bigelow was not now in the State of Montana, and was probably in the State of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial.
>
> Thereupon counsel for the plaintiffs offered to read said transcript of the testimony of said driver Bigelow, but the defendant objected thereto, on the ground that the testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available, and whether he would admit that impeaching testimony existed; but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat, and indicated the places referred to on the plat by such expressions as 'here' and 'there,' pointing to the plat, and the meaning of such references are now lost.
>
> Which objections were by the court overruled. To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.
>
> (Tr. pp. 81-82).

Upon cross-examination, the witness testified as follows:

> "Do you remember at any time—or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?
>
> By General Nolan: I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.
>
> By the Court: Sustained.
>
> By Mr. Veazey: We are not laying the foundation for impeachment, but are inquiring for evidence.
>
> By General Nolan: Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except in so far as this statement would be contradictory to anything he has said on the stand here.
>
> By the Court: I will allow him to answer the question.
>
> Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass?
>
> A. No, sir."
>
> (Tr. p. 93).

In the instant trial the following proceedings took place:

> "Before the first question above set forth, beginning with the words, 'Do you remember at any time, or did you at any time,' etc., was read, counsel for the defendant advised the Court that defendant desired to withdraw said question, and to waive it, and advised the Court that if the witness were present, an impeaching question would be propounded, since impeaching testimony was not available

and defendant demanded that the witness be produced, in order that an impeaching question might be propounded, but the court declined to allow said question to be withdrawn, or the answer thereto to be withdrawn. To which ruling of the court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed. And the court likewise overruled the demand of the defendant that said witness be produced. To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript containing the objection to said question and the court's ruling sustaining the said objection, and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence, was read, counsel for defendant advised the court that defendant desired to withdraw said disclaimer that it was not laying the foundation for impeachment, and counsel stated that, at the time of the former trial, the defendant did not have any impeaching testimony, and was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement or impeaching testimony, but that since then impeaching testimony had been procured, and defendant desired, therefore, to withdraw said disclaimer and to impeach the witness.

By the Court: The court will not permit it. Now, we will hear what the witness has to say and bring that up later.

To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed."

(Tr. pp. 94-95).

(*a*) As to the Admissibility of the Testimony Taken at the Former Trial.

It is contended that before this testimony was admissible, it was incumbent upon the plaintiff, not only to show that the witness was beyond the state, but that his absence was permanent and indefinite.

Section 7887 of the Revised Codes of Montana provides as follows:

> "In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:
>
> * * *
>
> 8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties relating to the same matter."

In the case of

> Chicago, St. P. M. & O. Ry. Co. v. Myers, 80 Fed. 361,

Judge Thayer of the Eight Circuit Court of Appeals, considering this matter, said:

> "The defendant company assigns for error that the trial court wrongfully excluded a stenographic report of the testimony of a witness by the name of Moses R. Dickey, which had been given on a former trial of the case, after the defendant company had shown that the said Dickey was a resident of the state of Ohio, and that the defendant had been unable to procure his attendance at the second trial. The rule appears to be established in Minnesota—where this case was tried—that such testimony is admissible. Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; King v. McCarthy, 54 Minn. 190, 55 N. W. 960. And the same rule, it seems,

prevails in some other jurisdictions. Railway Co. v. Elkins, 39 Neb. 480, 58 N. W. 164, and cases there cited. We can see no substantial ojection to the admission of such testimony when, on the first trial, the witness was fully examined and cross-examined, provided, always, that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct by the person by whom it was reported, and provided further that the witness is beyond the reach of the process of the court, and his personal attendance cannot be secured. Such testimony, we think, may very properly be accorded the same weight as a deposition duly taken on notice."

Professor Wigmore, discussing this question in his admirable work, and commenting on the requirements which are demanded by a few courts whose decisions are cited in the brief of plaintiff in error, says:

"Where the witness is out of the jurisdiction, it is impossible to compel his attendance, because the process of the trial court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless. Three conditions, however, have been by some courts suggested as essential in order that the present testimony may be regarded as unavailable in the fullest sense:

(a) The absence, it is sometimes said, must be by way of *residence,* not merely of temporary sojourn, because otherwise the trial could be postponed until his return. This, however, seems too strict a rule; by his absence he is at the time actually unavailable, no matter when he is to return; and, if the witness is not of such importance as to require a postponement until his return, still more if the opponent does not desire or con-

sent to a postponement, there is no reason for distinguishing between temporary and permanent absence.

(b) It is sometimes said that an effort should have been made to *persuade the witness'* voluntary attendance; and no doubt the trial court's discretion might occasionally make such a requirement; but it is unnecessary to prescribe this as a general rule.

(c) It has also been suggested that an effort should have been made to obtain the *witness' deposition by commission;* but this is futile, for a deposition is no better than his former testimony.

This ground of admission, then (absence from the jurisdiction of trial), is generally accepted for *testimony at a former trial;* a few courts, following an early New York ruling, refuse to recognize it at all; a few others refuse to recognize it in criminal cases particularly."

(Sec. 1404).

In Vol. 5, Encyclopaedia of Evidence, page 904, the rule is announced as follows:

> "The absence of a former witness from the state is sufficient ground for admitting proof of his former testimony."

And in support of this rule references are made to the following states:

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana Code of Civil Procedure, supra, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Utah and Vermont.

In the case of

Atchison Ry. Co. v. Osborn, 91 Am. St. Rep. 189,

the court said:

"At the second trial, the testimony of three persons who had testified on the first was offered by the railroad company and was rejected; and this ruling is the principal error assigned for reversal by the company, which was again the losing party.

It was shown that the witnesses were beyond the jurisdiction of the court and the reach of its process, and that one of them resided in another state. It was agreed that the persons referred to were called as witnesses on the former trial, that they were examined by defendant and cross-examined by plaintiff, and that their testimony was taken down by the official stenographer, who appeared with the same ready to testify, and that he was then able to read the notes and would testify that they were correct. The offered testimony was unquestionably material and pertinent to the issues in the case, and we think it should have been received. Under the general doctrine governing the admission of such testimony, it was early decided that the testimony of a deceased witness upon a former trial between the same parties was admissible, and that it was not necessary to give the exact words of the witness, but it was sufficient to prove the substance of such testimony: Gannon v. Stevens, 13 Kan. 447; Solomon R. R. Co. v. Jones, 34 Kan. 443, 8 Pac. 730. The rule was upheld in a criminal case, wherein the personal presence of the witness is of great importance: State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257. It was there held that the admissibility of the testimony depended upon two essentials—one, that it was given in a judicial proceeding between the same parties, upon the same subject of inquiry; and the other, that there was

opportunity and power to cross-examine. As an authority, the court cited 1 Greenleaf on Evidence, Sec. 163, where the learned author holds that the rule as to deceased witnesses is equally applicable to witnesses who are outside the jurisdiction of the court and out of the reach of its process. The rule laid down by Greenleaf was recognized in the case of Gilmore v. Butts, 61 Kan. 315, 59 Pac. 645, where the court had under consideration the admission of a copy of a lost deposition. It was there said that 'the trend of modern authorities is to the effect that if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, sick, or unable to testify, or has been subpoenaed but appears to have been kept away by the adverse party, his testimony given at a former trial may be received.'

The supreme court of Michigan holds that a witness who is beyond the jurisdiction of the court is, to all intents and purposes, so far as the parties to the litigation are concerned, legally dead. The process of the court can no more reach him, and the parties can no more avail themselves of his personal presence than if he were, in fact, dead: Howard v. Patrick, 38 Mich. 795. While there is some diversity of judicial opinion as to the admissibility of testimony given by a witness on a former trial, the great weight of authority, we think, sustains the Greenleaf rule."

To this last mentioned case, there is appended a note giving a large number of cases which hold that absence from the state alone is sufficient to admit the testimony.

We submit, however, that this matter is settled by the provisions of the Montana statute, supra, and that the stipulation admitting that the witness

was beyond the jurisdiction of the state rendered the testimony admissible.

(*b*) Right to Impeach Without Putting Impeaching Question.

As heretofore noted, when Mr. Bigelow was examined on the first trial, Judge Rasch then presiding, proceedings took place as heretofore set forth.

Section 8022 of the Revised Codes of Montana provides:

> "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 8025."

Section 8025 provides:

> "A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

These sections have been considered by the Supreme Court of Montana in a number of cases.

In the case of

State v. O'Brien, 18 Mont. 9,

the court said:

> "No authorities are needed further than the statute itself. It is but the expression of the reason of judicial decisions for years and

years. By disregarding its requirements, well established principles of the law of cross-examination were violated."

In the case of the

State v. Burrell, 27 Mont. 285,

the court said;

"Owing to the frequency with which able counsel raise the point, and contend for it in this court, that when, on cross-examination, a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of time, place and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If, in answer to a question so put, he deny that he has made any inconsistent statements, or says that he does not remember, that ends the matter; and he cannot be impeached by production of evidence that he has done so, for the reason that a proper foundation for such impeaching evidence has not been laid. (Section 3380, Code of Civil Procedure.) Before such evidence may be introduced to contradict him, common justice and ordinary fairness demand that he have his memory aided by such relation of such circumstances, and that he be allowed to tell and explain exactly what he did say, if he said anything apparently or at all inconsistent at other times. If counsel intend to go further, and to bring in evidence of such inconsistent statements, if the witness deny them or say he does not remember, then, and only then, is it necessary to lay such a foundation."

In the case of

Tague v. John Caplice Co., 28 Mont., 61,

the court said:

> "An offer was made by defendant to prove the substance of a conversation had between Mr. Heslet, the then president of the defendant company, and the plaintiff to this action, and, had the proper foundation been laid, the evidence would have been admissible and material, as tending to contradict the plaintiff's theory of the case, and possibly discredit the plaintiff himself; but it was clearly impeaching evidence, and the offer did not fix the time when the alleged conversation occurred or designate the persons who were present at the time, neither was the statement contained in the offer related to the plaintiff when he was on the witness stand, and the proffered testimony was therefore properly excluded."

This, however, seems to be the rule generally recognized. Thompson on Trials, Section 502, lays down the rule as follows:

> "The question propounded to a witness on cross-examination for the purpose of laying ground to impeach him by proof of contradictory statements out of court, must clearly state the *time, when,* the *place where* and the *person to whom* the statements were made."

And in the case of

Sinkler vs. Siljan, 68 Pac. 1024.

the Supreme Court of California said:

> "There were rulings on the admission of certain testimony that were prejudicial to plaintiff. When Bjornstad was testifying he was not asked as to any conversations with other persons since the transfer of the note to plaintiff, or as to any statements made by him to any one, relative to the note or his ownership or transfer of it. Defendant was in Grafton, N. D., in the fall of 1900, some time after the transfer of the note. He and

Bjornstad met, and had some talk about a settlement and defendant testified: 'I told him (Bjornstad) that he would have to call this note back, and that that is the only way we could settle it. Then he said 'if you will loan me $500, I will give the note back. You will get the note back.' Witness Euchane testified to a conversation he had at Grafton with Bjornstad in October, 1900. He testified: 'We got to talking, and he asked me if I was going back to Nome this summer, and I said I might go, and so he wanted me to find out how much Siljan could take out this summer. He had a note against him for $3,000.' There were other statements of Bjornstad testified to by other witnesses on other matters, introduced as inconsistent with his testimony, and as to which his attention was not called when testifying. Timely objection was properly made to all this evidence, and exceptions reserved. This testimony was in violation of section 2052 of the Code of Civil Procedure. If it were admissible to show that Bjornstad had made statements, since the transfer of the note, tending to discredit plaintiff's title as indorsee and to show that the payee indorser still held the note, which, in any event, could only be done to impeach Bjornstad's testimony, the statements should have been related to him 'with the circumstances of the times, places and persons present,' and he shold have been 'asked whether he made such statements, and, if so, allowed to explain them'; and this is generally the rule whether the declarations of the witness are offered for the purpose of impairing the force of his testimony, or are offered as contradictory statements for the same purpose. In either case an opportunity should be given the witness to explain what he said. These statements of plaintiff's assignor bore directly on a material issue before the jury, and could not have failed to

> impair not only Bjornstad's testimony, but that of plaintiff himself, and probably had a direct influence in leading the jury to disregard the positive instruction of the court to find for the plaintiff, and were necessarily prejudicial."

Indeed, if Mr. Bigelow was present testifying, and with the question which was put to him now under consideration, general in its nature, impeaching evidence could not be introduced to show that he made the statement which it is claimed he did to the witness Gardner.

As was stated by the Supreme Court of Montana in the Burrell case, supra, the answer made to such a general question was controlling and final. It was the misfortune of the plaintiff in error that at the time that Bigelow was examined, it was without information as to this alleged conversation with Mr. Gardner. When the instant trial took place, the plaintiff in error was in the possession of information about this conversation. It could have taken the deposition of Mr. Bigelow, so that the proper foundation might be laid, or it could have, undoubtedly, secured a continuance until either the presence of Mr. Bigelow might be secured or his deposition taken. As stated by the learned trial judge, cases are lost and won because important evidence cannot be produced. Suppose, however, that the court permitted this impeaching evidence, in what situation would the defendants in error be placed? They would not be in a situation to rebut such evidence. The

learned counsel for the plaintiff in error with jaundiced vision can only see one side.

We respectfully insist that there is no warrant, in reason or in law, for entertaining the demands and requests which were made to suppress this testimony or permit the impeaching testimony which was offered.

But, suppose for the sake of argument, that the plaintiff in error was allowed to place Mr. Gardner upon the stand. How was Mr. Bigelow to be impeached? Mr. Gardner and Mr. Bigelow conversed about this matter, so it is said, but Mr. Gardner could not rememmber what Mr. Bigelow said to him. We desire, however, to let the record speak:

> "I reside at Lakeside, Montana. I was acquainted with John Bigelow prior to the accident in question. I talked with him in regard to the accident on Mr. Hennessey's place in the granary. I first met John Bigelow eight years ago this spring. I do not remember what the substance of that conversation was. I know we were talking about this case, but I don't know what the substance of the conversation was. I do not remember what he said at that time in regard to how the accident happened. I remember talking with Dr. Brockman in regard to the accident.
>
> Q. Do you remember telling him what Bigelow told you in regard to the accident?
>
> By Col. Nolan: We object to that as immaterial, whether he does or not. It is hearsay evidence of the rankest kind. If he did, seemingly he told him something he did not know anything about.
>
> By the Court: I presume you are approaching impeachment.

By Mr. Veazey: Not entirely. It might be considered impeachment in one sense, but it might be considered as substantive evidence. That is, it might be considered as a declaration made by a person who would be responsible for the runaway, in which event it is a declaration made by a person whose duty is in question in this case. The duty of the driver as a third person is a question in dispute in this case, and therefore, whatever, would be evidence for or against the driver is evidence between the parties to this case.

By the Court: I don't understand it so. You might bring in the statements of servants. That happens every day. It might be admissible for impeachment if the plaintiffs propose to let it go in for that purpose.

By Mr. Veazey: I have in mind also the question that was put to Bigelow in his deposition. We advised the court at the time the testimony of Bigelow was being read, that at the time Bigelow testified, we had no impeaching testimony, and at the time his testimony was read we withdrew the disclaimer that the question was not asked Bigelow for the purposes of impeachment.

By the Court: You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. When you ask a witness if he made a statement you must ask him the time and the place and the person in whose presence it was made. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is no fault of the other side. Even the best cases are sometimes lost because testimony cannot be produced. The objection will be sustained.

To which ruling of the court the defendant, by its counsel, then and there duly excepted;

which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We now desire to renew our objection and exception to the reading of the testimony of Bigelow, as taken at the last trial, on the ground that its admission with the rulings of the court forecloses us from introducing impeaching testimony, and the ruling of the court requiring us to stand by our disclaimer after we withdraw it, and compelling us to have read in the evidence the impeaching question propounded to Bigelow, with the disclaimer, and then not permitting us now to withdraw the disclaimer, and introduce the impeaching testimony, is prejudicial to the defendant. Which said exception was thereupon noted and allowed.

Thereupon the defendant made an offer of proof in writing, as follows:

We offer to prove by the witness now on the stand that he talked to Bigelow in regard to the cause of the accident, but that the conversation occurred so long ago that he does not remember the substance of that conversation; that the witness does, however, remember that thereafter he talked with Dr. Brockman and told Dr. Brockman what Bigelow had told him (the witness) in regard to the accident. We offer further to prove by the witness that he told Dr. Brockman only the truth in regard to what Bigelow told him (the witness).

This testimony is offered for the purpose of impeaching Bigelow in the first place. Secondly, and separately, as an admission by the driver, as one whose duty in this case is in question, and therefore, as a declaration or admission made by the driver would be admissible for or against him, it would be admissible for or against the plaintiffs to this case, and in connection with this offer of proof an offer will hereafter be made through Dr. Brockman, now in court, to prove that

that conversation, that Gardner had with Dr. Brockman, was to the effect that Bigelow told Gardner that the runaway was caused by the horses becoming frightened at a piece of paper, and not by the carcass. This will connect up the proof and avoid any possible hearsay objection whatever, in that the conversation or statement of Gardner is under oath to the effect that he had a conversation and reported it correctly to Brockman, and Brockman, under oath, states what Gardner said."

(Tr. pp. 132-135).

Dr. Brockman was called and he testified as follows:

"I reside at Polson, Montana. I used to reside at Lakeside, at the time of the accident to Mrs. Ennis, on a homestead there. I know William Gardner. I talked with him in regard to the Ennis accident.

By Col. Nolan: You want to ask this witness if Gardner didn't tell him something.

By Mr. Veazey: Yes.

Thereupon the defendant offered in writing to prove by the witness now on the stand (Dr. Brockman) that shortly after the accident he had a conversation with the witness Gardner, in which Gardner discussed the accident and the cause thereof, and told the witness that Bigelow had told him (Gardner) that it was a piece of paper that scared the horses and caused them to run away, and not the carcass.

By Col. Nolan: I object to that as incompetent and hearsay.

By the Court: Objection sustained. Do you contend that there is any possible legal basis upon which that evidence would be proper?

By Mr. Veazey: Yes, but your honor has

ruled that you do not desire argument. I will submit it to your honor at another time." (Tr. pp. 162-163).

If, as counsel suggests, the testimony of Mr. Gardner was intended to impeach Mr. Bigelow, it could only be done by splicing Dr. Brockman on to Mr. Gardner. In other words, it would be a case where Mr. Gardner had a conversation with Mr. Bigelow, but could not remember what Mr. Bigelow said to him. He could, however, testify that about that time he had a conversation with Dr. Brockman and he told Dr. Brockman what Mr. Bigelow had told him, and Dr. Brockman would testify to what Mr. Gardner said Mr. Bigelow told him. Hearsay evidence carried to the second degree.

Supposing, however, that Mr. Gardner should be treated as a hostile witness, and that Dr. Brockman should be considered competent for the purpose of impeaching Mr. Gardner. Of course, no suggestion is made that the evidence of Dr. Brockman was offered for that purpose. In what situation do we find ourselves? Mr. Gardner had testified to nothing, and, therefore, his impeachment could not be effected, and if Dr. Brockman were permitted to say that Gardner made the statement to him, as alleged, that would be no evidence at all that such a statement was made by Mr. Bigelow to Mr. Gardner.

It is also urged that by section 7868 of the Revised Codes of Montana, any statement made by Bigelow at any time was *prima facie* evidence,

and was admissible as if made by a party to the action. The section referred to appears in appellant's brief and is as follows:

> "And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties."

If the meaning is to be given to this section which counsel contends for, then, in all negligence cases, where the relation of master and servant exists, the statement of the servant, whose negligent conduct caused the injury, made at any time would be binding upon the master, and such statement related by a third person would be primary evidence against the master. In the case of a railroad corporation, a derailment occurring through the negligence of an engineer or brakeman, if this section covers the field contended for, then the statement of such brakeman or engineer made at any time to any third person as to how the derailment occurred could be detailed by such third person. No authority is cited by counsel in support of this principle and we venture the suggestion that none can be found.

California has the same statute, and although it has been in existence in that state since 1874 (Sec. 1851), we find that only in five cases has the statute been considered, and then on matters entirely foreign to the present contention. We have reference to the following cases:

> Butte County v. Morgan, 18 Pac. 115;
> McGorry v. Robinson, 67 Pac. 279;

Western Union Oil Co. v. Newlove, 79 Pac. 542;
Greve v. Echo Oil Co., 96 Pac. 904;
Northwestern Redwood Co. v. Dicken, 110 Pac. 591.

We respectfully submit that Mr. Bigelow's statements made to third persons and as a narrative of how the runaway occurred, in the absence of the parties to the action was hearsay evidence.

WITHDRAWAL OF PORTIONS OF CROSS-EXAMINATION OF MRS. CHARLES ALLISON.

Depositions were taken by the defendants in error for use upon the trial of the case. These depositions were taken pursuant to a stipulation reading as follows:

> "It is herey stipulated that the depositions of Mrs. Charles Allison, formerly Miss Alma Hanson, Katy Meinhardt, Charles Conwell, R. H. Sweetman, Charley Johnson, Charles N. Bain, John Lundquist and Fred Swan may be taken before William Powers, a United States Commissioner and notary public, at Bainville, Montana, and that, when taken, the said depositions may be used on the trial of said action, subect to the same objections, except as to form of interrogatives, as if said witnesses were personally present and testifying upon the trial of said cause, and that said depositions may be taken in shorthand and transcribed into typewriting, and, when so transcribed, shall be received by said parties and used as true and correct copy of said testimony given at said hearing, and both parties to this stipulation waive the signing of the depositions by the witnesses, subject to all ob-

jections except as to form, and subject to any rights reserved in this stipulation."
(Tr. pp. 199-200).

Mrs. Allison's deposition was taken (Tr. p. 98), and upon her direct examination and without objection she testified as follows:

"As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day, as to his being sober, or under the influence of liquor, he was perfectly sober as far as I could see. He was very much excited at the time he came to tell me about it."
(Tr. p. 100).

As the deposition was read, when the cross-examination was reached the following occurred:

"Thereupon, upon the defendant objecting to the following portion of said deposition, the same was first read to and passed upon by the court, to-wit:
Q. Did Mrs. Ennis say anything to you at the time about his having had any liquor, or anything like that?
A. No, she did not.
Q. Did she say anything after the accident about his having had any liquor?
A. No, sir.
The defendant objected to said questions and answers, on the ground that the defendant had waived the cross-examination, and that therefore none of said cross-examination should be read in evidence, and in so far as the cross-examination has been admitted in evidence, this portion is a cross-examination as to a matter concerning which the defendant was forced to enter into, by reason of the improper questions asked in the direct examination, there being at the time the deposition was taken no one present who could rule on

the competency of said testimony, and said questions in the cross-examination were asked merely for the purpose of developing anything that might have been said, or that is pretended to have been said by Mrs. Ennis, seeking to sound the reliability of the witness' testimony as regards the alleged conversations with Mrs. Ennis, and said cross-examination now becomes at most direct examination, and the portion referred to is hearsay and incompetent, and does not come within any exception to the hearsay rule.

Which said objection was by the court overruled. To which ruling of the court the defendant, by its counsel, then and there duly excepted."

(Tr. pp. 102-103).

And as the reading of the cross-examination continued, the following occurred:

"Q. And during those conversations did she say to you anything about Mr. Bigelow having been drinking that day?

Which said question was objected to for the reasons stated in the last objection.

Which said objection was by the court overruled.

To which ruling of the court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed."

(Tr. p. 103).

In the first place, referring to the suggestion that in the taking of the depositions no person was present who could rule on the competency after testimony, the best answer to this is that under the stipulation objections could be made when the depositions were read. When the direct testimony

was read question and answer, no objection was then made to the testimony.

It is contended that the court erred in the particulars referred to. The consideration of these alleged errors, likewise, presents for consideration the alleged error because of the refusal of the court to permit the withdrawal of the Bigelow question.

In the next place the depositions were the depositions of the defendants in error. Under the authorities which plaintiff in error cites the defendants in error had an absolute and unqualified right to use the entire deposition. Controversies have sometimes arisen as to the right of a defendant to use depositions taken by the plaintiff, when plaintiff elects not to use same, and controversies have sometimes arisen as to the right of litigants to use portions of depositions. Whatever may be the holding of courts regarding these matters, we find no decision which would prevent the plaintiffs from using the depositions taken by them, and by deposition we mean the deposition in its entirety, direct examination and cross-examination. It is true that under stipulations, objections upon their use at the trial could be urged as if the witnesses were testifying at the trial, except as to the form of the interrogatories. Would it be contended for a moment that if these questions were put to the witnesses orally at the trial, answers elicited, and upon reflection finding that the answers weren't satisfactory, that counsel

would be at liberty to withdraw this evidence? The question answers itself. The questions put to the witness were proper questions, and were not objected to. They became a part of the deposition, and if there was anything in the answers helpful to the defendants in error, it was their right to enjoy the resultant benefit.

Cyc, as to the use of depositions, Vol. 13, page 979,

declares the rule to be as follows:

> "A valid and competent deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it. Especially is this so where the deposition is taken on interrogatories propounded by both parties. And while the use of a deposition by the adverse party is somewhat a matter of practice, and governed in most instances by statute or rules of court, yet it may be stated as a general rule that where a deposition has been taken by one party and filed in the cause his adversary is entitled to use it in evidence, although the first party refuses to introduce it in his own behalf; and even where there is a subsequent trial of a former action the deposition may be again introduced in evidence at latter trial."

With much stronger reason may it be urged that the party taking the deposition is entitled to use same.

In the case of

Memphis & C. Packet Co. v. Pikey, 40 N. E. 527,

the court used the following language:

> "Appellee on the trial, read to the jury the depositions of three witnesses, taken by her.

> When appellee was about to read the cross-examination appellant objected, stating to the court, as the reason therefor: 'That the cross-examination was testimony for defendant, and as such is controlled by the defendant, the same as if the witnesses had testified from the stand, and defendant had refused to cross-examine them. It is optional with the defendant to have the cross-examination of the witness read to the jury.' This objection the court overruled, and permitted the cross-examination of the witnesses to be read to the jury. This ruling of the court below was correct. The depositions had been taken on behalf of appellee. Appellant had attended the taking of the depositions, and cross-examined the witnesses, and could no more prevent, by objection, the cross-examination being read at the trial, than it could ask the court to strike out and direct the jury to disregard evidence given on cross-examination of a witness at the trial of the cause.

We refrain, however, from prosecuting this discussion further, for, as already stated, the principles which we are here declaring are the principles which are recognized by the courts whose decisions are so plentifully cited on this topic in the brief of plaintiff in error.

EXCESSIVE VERDICT.

Although under the practice prevailing, this court is foreclosed from considering this question, nevertheless it is presented for consideration.

> Baltimore &. O. R. Co. v. Smith, 222 Fed. 667.

We quote as follows from the case of

> Williamson v. Osenton, 220 Fed. 653.

"In such an action for damages this court cannot review the action of the District Court in refusing to grant a new trial for excess in the verdict. The provision of the seventh amendment of the Constitution that 'no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law,' was held in Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732, to deny to a federal appellate court that power. N. Y. C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25, L. Ed. 531; Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. There is no more salutary judicial power than that of relieving against excessive verdicts. With the changes which modern life has brought, the importance of the exercise of the power with moderation and firmness becomes more and more important, especially when it is considered that the refusal of the trial court to give relief cannot be reviewed. Large as this verdict is, the motion to reduce by granting a new trial nisi was in the discretion of the District Court and beyond the consideration of this court."

We have examined the cases cited in appellant's brief. In nearly every instance the measure of compensation is the pecuniary loss sustained on account of deprivation of services. In addition to deprivation of services, in Montana the loss of comfort, society and companionship may be considered.

Mize v. Rocky Mt. Tel. Co., 38 Mont. 534.

In the case of

Hollenback v. Stone & Webster Eng. Corp. 46 Mont. 559,

it was said:

"If it is possible from the evidence in this

record to account for the amount of the verdict, then this court ought not to interfere.

* * *

Under the statute, the amount of the verdict must of necessity rest in the sound discretion of the jury. The parties are entitled to a verdict from the jury, and it is only in rare instances that the court is justified in interfering, unless the record discloses that the elements of passion and prejudice have influenced the minds of the jurors in arriving at the result."

This matter was considered upon a motion for a new trial, and as already stated, the court's action is final and should be deemed so.

REMARRIAGE.

There is also discussed in appellant's brief the fact that since the trial, Dr. Ennis remarried. How it is expected that this matter can be considered by this court passes comprehension. The record nowhere discloses that fact. It was urged upon the consideration of the trial court on the hearing of the motion for a new trial and failed of its purpose.

We met the proposition then, as we meet it now, by saying that outside of the two cases referred to in appellant's brief, and an inspection of these cases plainly shows that they are of no value as authority on the proposition under consideration, the courts universally hold that this character of evidence is not competent. As to its admissibility, the doctrine is broadly stated in

Vol. 8 Am. & Eng. Ency. of Law, page 937, as follows:

> "In an action by a husband to recover for the wrongful killing of his wife, in which one of the principal elements of damage is the loss to him of his wife's services, the defendant cannot show, in reduction of damgaes, that the plaintiff has married a second wife who performs for him all the services rendered by his deceased wife."

We have discussed with painstaking detail, all of the points which are urged in the brief of appellant, and most respectfully insist that the errors complained of do not exist, and that the judgment should be affirmed.

Respectfully submitted,

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